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No. 80-

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES DEPARTMENT OF EDUCATION,
PETITIONER

v.

SEATTLE UNIVERSITY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether Sections 901(a) and 902 of the Education Amendments of 1972, 20 U.S.C. 1681(a) and 1682, authorize the Department of Education to issue regulations prohibiting sex discrimination in the employment practices of school districts and educational institutions receiving federal financial assistance.

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The Solicitor General, on behalf of the United States Department of Education, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is reported at 621 F.2d 992. The opinion of the district court (App. B, *infra*) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1980 (App. D, *infra*). On September 8, 1980, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including September 26, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

1. Section 901(a) of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a), provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:
>
> **(1) Classes of educational institutions subject to prohibition**
>
> in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Commissioner of Education, whichever is the later:

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate

higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices—

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to—

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for—

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

2. Section 902 of Title IX of the Education Amendments of 1972, 20 U.S.C. 1682, provides:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with

any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

3. The regulations of the Department of Education provide in pertinent part:[1]

[1] These regulations, at the time of the court of appeals decision, appeared at 45 C.F.R. 86.51(a)(1) and 86.54, respectively. They were recodified on May 9, 1980, in connection with the establishment of the Department of Education, 45 Fed. Reg. 30802, 30962, 30963 (1980); see note 2 *infra*.

34 C.F.R. 106.51(a)(1):

No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

34 C.F.R. 106.54:

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

STATEMENT

Seattle University brought suit on September 1, 1977, to enjoin an investigation by the Department of Health, Education, and Welfare (HEW)[2] under regulations prohibiting sex discrimination in the employment practices of educational institutions operating federally

[2]The functions of HEW under Title IX of the Education Amendments of 1972 were transferred to the Department of Education by Section 301(a)(3) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 677, 678. Since all of the relevant actions in this case were taken by HEW prior to the reorganization, it will be necessary to refer to that agency in addition to the Department of Education in this petition.

assisted education programs and activities (App. A, *infra*, 3a).

The University receives financial assistance in support of its educational programs and activities, and it is therefore subject to the provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.* (hereinafter "Title IX"), and to authorized regulations promulgated to effectuate those provisions by federal departments and agencies through which it receives such financial assistance (App. B, *infra*, 8a).

To implement Section 901(a) of Title IX, 20 U.S.C. 1681(a), which provides that, with certain enumerated exceptions, "[n]o person * * * shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance," HEW issued regulations that, *inter alia*, prohibit sex discrimination in the employment practices of federal education aid recipients. 45 C.F.R. 86.51 *et seq.* (now codified at 34 C.F.R. 106.51 *et seq.*).

In June, 1975, HEW notified the University that it had received a complaint from certain faculty members in the University's School of Nursing alleging sex discrimination in the payment of salaries, in violation of Title IX. HEW initiated an investigation of the employment practices of the University focusing on a comparison between salaries paid to faculty in the nursing school and those paid to faculty members in other schools and departments. While the University initially supplied information in response to HEW's request, it refused to comply with a request made by

letter of May 19, 1977. In refusing, it relied on the decision of the district court in *Romeo Community Schools* v. *HEW*, 438 F. Supp. 1021 (E.D. Mich. 1977), aff'd, 600 F.2d 581 (6th Cir.), cert. denied, 444 U.S. 972 (1979), that HEW had no authority to issue employment regulations under Title IX. The instant suit followed seeking declaratory and injunctive relief against further action by HEW to investigate the sex discrimination complaint (App. A, *infra*, 3a).

2. On cross-motions for summary judgment, the district court ruled for the University, holding that the adoption and issuance by HEW of the regulations then contained in 45 C.F.R. 86.51-86.61 are in excess of the authority conferred upon the agency by Congress under Title IX (App. B, *infra*, 7a-18a). The court concluded that "[t]hough cast in broad terms" the prohibitory language of Section 901(a) of Title IX "addresses itself only to sex discrimination against the participants in and the beneficiaries of federally assisted education programs" (*id.* at 11a). In the court's view, only those employees for whom a federal grant is designed, e.g., faculty members who receive research grants, are within Title IX's antidiscrimination provisions (*ibid.*). The court buttressed its conclusions by noting that the coverage exclusions in Section 901(a) relate to student activity or enrollment; it reasoned that the most likely explanation for the absence of any exclusions for employment practices is that Congress never intended to include employment within the coverage of the statute (*id.* at 11a-12a). Further, the court concluded that the statute is "program specific," *i.e.*, that Section 901 and 902 encompass discrimination only in specific education programs and activities that

directly receive federal financial assistance (*id.* at 12a-13a). Regulation of employment practices generally would thus be unauthorized (*id.* at 14a-15a). Finally, while recognizing the possible validity of prohibiting employment discrimination that adversely affects students, the court concluded that that goal was the focus of neither the regulations themselves nor HEW's investigation in this case (*id.* at 16a-17a).

3. The court of appeals affirmed (App. A *infra*, 1a-6a), relying upon the decisions of the courts in *Romeo Community Schools* v. *HEW*, *supra*; *Islesboro School Committee* v. *Califano*, 593 F.2d 424 (1st Cir.), cert. denied, 444 U.S. 972 (1979); and *Junior College District of St. Louis* v. *Califano*, 597 F.2d 119 (8th Cir.), cert. denied, 444 U.S. 972 (1979). It held that "neither the plain language of Title IX nor the legislative history support HEW's [employment coverage] contention" (App. A, *infra*, 4a). Concluding that the prior decisions had "thoroughly addressed" each of HEW's arguments, the court found it "unnecessary to add to their discussions" (App. A, *infra*, 5a-6a). The court also agreed that while the " 'infection theory' " might be valid, a " 'nexus between the discrimination against employees and its effect on students must first be shown' " (App. A, *infra*, 4a-5a, quoting *Islesboro School Committee* v. *Califano*, *supra*, 593 F.2d at 430).

REASONS FOR GRANTING THE PETITION

The courts of appeals are at present in conflict on the question whether the Department of Education is authorized to prohibit those receiving federal financial

assistance for education programs and activities from discriminating, on the basis of sex, against their employees. We sought review in this Court, in the absence of a conflict in the circuits, of three prior decisions invalidating the HEW-promulgated regulations (regulations now adopted by the Department of Education) because those decisions, which together applied to a substantial portion of the nation, severely disrupted the Title IX enforcement program. The Court denied our petitions for certiorari in those cases, with Justices Brennan and Marshall dissenting. *Romeo Community Schools* v. *HEW*, *supra*; *Islesboro School Committee* v. *Califano*, *supra*; *Junior College District of St. Louis* v. *Califano*, *supra*. Subsequently, in addition to the court below, two other courts of appeals have decided the issue.

In *North Haven Board of Education* v. *Hufstedler*, Nos. 79-6136, 79-6247, 79-7747 (July 24, 1980), petition for rehearing pending, the Second Circuit held that the employment regulations are valid under Title IX (App. C, *infra*, 19a-48a).[3] In *Dougherty County School System* v. *Harris*, 622 F.2d 735 (1980), the Fifth Circuit, while affirming a lower court decision invalidating the regulations as overbroad, concluded that the statute reaches "at least some employment practices" of federal aid recipients. 622 F.2d at 738. We submit that the decision of the Second Circuit correctly construes the language and legislative history of

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[3] We shall promptly inform this Court of any forthcoming action by the Second Circuit on the presently pending petition for rehearing and suggestion of rehearing *en banc* in *North Haven*.

Title IX and that the conflict among the circuits on the issue reinforces the need for resolution by this Court.[4]

1. Section 901(a) of Title IX, 20 U.S.C. 1681(a), provides that:

> [n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance * * *.

The statute expressly prohibits three types of discrimination against all persons, *i.e.*, no person may "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under" federally assisted education programs or activities. The decisions of the courts below unduly focus on only one of those prohibitions—nondiscrimination in the

[4] As we stated in our petition in *Harris* v. *Islesboro School Committee*, No. 79-200 (O.T. 1978), cert. denied, 444 U.S. 972 (1979), we have been advised that the Office for Civil Rights (now in the Department of Education) has instructed its regional offices to proceed only in those cases in which it can be shown either (1) that the principal purpose of the federal assistance in question is to provide employment or (2) that the allegedly discriminatory employment practice may have a discriminatory impact upon students or other direct beneficiaries of the federal assistance. The first category of cases would come within Section 901 as construed by the courts below; the court of appeals expressly left open the question whether the second category of cases is covered.

On August 27, 1980, the House of Representatives passed an amendment (Section 309) to the Departments of Labor, Health and Human Services and Education and Related Agencies Appropriation Act, 1981, H.R. 7998, forbidding use of appropriated funds to enforce the portions of the regulations that have been invalidated by the courts of appeals unless and until the conflict among the circuits has been resolved in favor of their validity. 126 Cong. Rec. (daily ed. Aug. 27, 1980) H8000 - H8001. The bill, with that amendment, is now pending in the Senate.

disbursement of federal benefits. The district court's conclusion that the language of the statute on its face "addresses itself only to sex discrimination against the participants in and the beneficiaries of federally assisted education programs" (App. B, *infra*, 11a)—"participants" and "beneficiaries" being defined by the court as students attending the educational institution or teachers directly receiving federally funded research grants—gives insufficient weight to the two other prohibitions of the statute.[5] Although interpreting the statute more narrowly than we believe is warranted, the Fifth Circuit in *Dougherty County School System* v. *Harris*, *supra*, recognized that the language protects not only students but "all who may be 'excluded from participation in, be denied the benefits of, or be *subjected to discrimination under*' education programs or activities receiving federal assistance." 622 F.2d at 737–738 (emphasis in original).[6]

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[5] Because the court of appeals merely adopted the reasoning of prior decisions on this issue, we will refer in this petition to the decision of the district court or to those of the other courts of appeals on which the court below relied.

[6] The *Dougherty County* court concluded, however, that Title IX regulations could not validly extend beyond those employees of a federal aid recipient who work in specific programs receiving federal financial assistance. We disagree with the Fifth Circuit's view that the specific purposes for which federal funds are used by an educational institution or system properly control the scope of regulations under Title IX or the Department of Education's authority to investigate possible employment discrimination in that institution or system's educational program. We do, however, acknowledge that the Department's fund-termination authority under Section 902 is limited to "the particular program or part thereof" in which discrimination or its effects are shown. See *North Haven Board of Education* v. *Hufstedler*, *supra* (App. C, *infra*, 47a–48a).

Employees of an educational institution are as susceptible of being "excluded from participation in" federally assisted programs or "subjected to discrimination under" such programs as are the students in those programs. For example, if the respondent university refused to hire teachers of one sex to teach in particular federally funded programs (regardless of the source of funding for the particular teacher's salary), such persons would "be subjected to discrimination under" those programs. The decisions below prevent HEW from taking steps to assure that such types of discrimination do not occur, even though they come within the plain language of the statute.

No language in any other part of Title IX states either expressly or by implication that employees who are subjected to discrimination on the basis of sex as defined in Section 901(a) are to be excluded from the coverage of the regulations authorized by Section 902. The fact, relied on by the district court (App. B, *infra*, 11a–12a), that none of the Section 901 exemptions addresses employment may more readily be taken to mean that no exemptions for employment discrimination were intended than that employment discrimination was not covered by Section 901. Indeed, as the court in *North Haven* noted (App. C, *infra*, 38a–41a), statements made by the Senate sponsor of Title IX indicate that employment coverage was assumed in drafting the exemptions. Exemptions for educational institutions controlled by a religious organization (Section 901(a)(3)) and for military schools (Section 901(a)(4)) were described as applying to employment practices. 118 Cong. Rec. 5813 (1972) (remarks of Senator Bayh). Thus construed, Section 901 in its entirety

simply reflects the intention of the Senate sponsor that, while there were exceptions to coverage in other areas, "[i]n the area of employment, we permit no exceptions * * *." 118 Cong. Rec. at 5812 (1972). As our discussion of the legislative history below indicates, a provision specifically prohibiting agencies from taking action with respect to any employment practice of a federal aid recipient unless a primary objective of the aid is to provide employment was proposed by the House of Representatives and deleted in the conference committee. Title IX as it emerged from that committee unambiguously prohibits sex discrimination against employees in education programs and activities receiving federal aid without regard to the primary objective of the aid, and it accordingly authorized HEW to issue and enforce regulations effectuating that prohibition.

3. In enacting Title IX of the Education Amendments of 1972, Congress intended to address comprehensively the "persistent patterns of discrimination against women in the academic world." 118 Cong. Rec. 5804 (1972) (remarks of Senator Bayh). One of the specific targets of this legislation was discrimination against "those women who choose to make education their life work." *Id.* at 5804-5805. Senator Bayh, in introducing the amendment that became Title IX,[7] pointed to a number of areas in which women receive

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[7]The legislation introduced by Senator Bayh, designated "Amendment 874," was offered as an amendment to S. 659, a bill to amend the Higher Education Act of 1965 and other Acts concerned with education. 118 Cong. Rec. 5791, 5802-5803 (1972).

unequal treatment in employment by educational institutions: discrimination in hiring, fewer opportunities for advancement, preference for men in administrative positions, and denial of equal pay for equal work. *Id.* at 5805. The aim of Senator Bayh's amendment was "to expand some of [the] basic civil rights and labor laws to prohibit [this documented] discrimination against women." *Id.* at 5807.

Senator Bayh's amendment consisted of several distinct parts: the prohibition of sex discrimination and the related enforcement procedures which, with no changes here pertinent, appear in Sections 901 and 902 of Title IX, now codified at 20 U.S.C. 1681-1682; a provision amending a section of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, so as to make Title VII applicable to employees of public educational institutions, who were originally excluded; and a provision amending the Equal Pay Act, 29 U.S.C. 213(a), so as to make it applicable to administrative, executive, and professional workers. 118 Cong. Rec. 5803, 5807 (1972).[8] The conclusion in *Romeo Community Schools* v. *HEW*, *supra*, 600 F.2d at 584-585, and *Islesboro School Committee* v. *Califano*, *supra*, 593 F.2d at 427-428—decisions relied on by the court below—that Senator Bayh's amendment dealt with employment discrimination only through the amend-

[8]Section 1009 of Senator Bayh's amendment, amending the Equal Pay Act, became Section 906(b)(1) of Title IX, Pub. L. No. 92-318, 86 Stat. 375. The amendment of Title VII of the Civil Rights Act of 1964 was ultimately deleted because, just before final passage, a similar amendment was enacted as part of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, amending 42 U.S.C. 2000e(a).

ments to Title VII and the Equal Pay Act is contradicted by the explanations given by Senator Bayh himself in introducing his amendment and in the ensuing debate.

Perhaps the clearest expression of the intent of the amendment came in the Senator's summary of what his amendment was designed to accomplish and how it would do this. *Id.* at 5806–5808. The Senator broke his summary down according to what he termed different "portion[s]" of the amendment. His explanations of the first two such portions appear in the Congressional Record under the headings "A. Prohibition of Sex Discrimination in Federally Funded Education Programs" and "B. Prohibition of Education-Related Employment Discrimination." *Id.* at 5807. In the first part of his summary he describes the basic prohibition against sex discrimination and the "enforcement provisions which generally parallel the provisions of title VI [of the Civil Rights Act of 1964]" (*ibid.*); and in the second part he describes the amendments to Title VII of the Civil Rights Act of 1964 and the Equal Pay Act. Despite the contrary inference that might be drawn from the headings alone, Senator Bayh's description of the first portion of his amendment shows that Section 901 of Title IX was intended to cover discrimination in employment practices by educational institutions receiving federal support for their programs.[9] Thus,

[9] Part "A" of the summary begins with the statement, "Central to my amendment are sections 1001–1005, which would prohibit discrimination on the basis of sex in federally funded education programs." *Id.* at 5807. The reference to "sections 1001–1005" is evidently a misprint for "sections 1001–1004," since Section 1005 is the amendment to Title VII, which is not limited

after describing the mechanics of the amendment (the authority conferred on HEW to issue regulations, to permit certain types of "differential treatment" of students based on sex, and to penalize violations of regulations by fund termination), the Senator then defines the types of sex discrimination subject to these procedures (*ibid.*):

> This portion of the amendment covers discrimination in all areas where abuse has been mentioned—employment practices for faculty and administrators, scholarship aid, admissions, access to programs within the institution such as vocational education classes, and so forth. The provisions have been tested under title VI of the 1964 Civil Rights Act for the last 8 years so that we have evidence of their effectiveness and flexibility.

Because that description of the scope of the amendment is obviously part of a prepared statement rather than off-the-cuff remarks uttered in the heat of debate, it shows clearly that in the subsequent colloquy between Senator Bayh and Senator Pell concerning Section 1001(a) and (b) of Senator Bayh's amendment (the predecessors of 20 U.S.C. 1681(a) and (c), respec-

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to "federally funded education programs" and which, as noted, is discussed in Part B of the summary, along with the Equal Pay Act amendment. The error may reflect a confusion with the numbering of similar provisions in Title X of the original House bill, H.R. 7248, which included an extra section. H.R. Rep. No. 92-554, 92d Cong., 1st Sess. 108 (1971); 117 Cong. Rec. 39098-39099 (1971). See the discussion in *North Haven* (App. C, *infra*, 37a n.11). The difference in numbering between Senator Bayh's amendment and the provisions ultimately enacted is attributable to the fact that Senator Bayh's amendment was originally planned as Title X of S. 659. 118 Cong. Rec. 5791, 5803 (1972).

tively), Senator Bayh means exactly what he says concerning the scope of Section 1001 (118 Cong. Rec. 5812):

> Mr. PELL. * * * Sections 1001(a) and (b) include all educational institutions which receive Federal assistance. This includes elementary and secondary schools as well. With regard to private undergraduate colleges, the Senator has excluded * * * their admissions practices. Does the same exclusion apply * * * at the elementary and secondary level?
>
> Mr. BAYH. At the elementary and secondary levels, admissions policies are not covered. As the Senator knows, we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, and discrimination in employment within an institution, as a member of a faculty or whatever.

These remarks by Senator Bayh, together with his summary, quoted above, of the scope of the first "portion" of his amendment, cannot be dismissed—in the words of the court in *Islesboro*—as "occasional lapses" reflecting "the imprecision of oral discussion," 593 F.2d at 428. As the remarks of the sponsor of language ultimately enacted, they are an authoritative guide to its construction. *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-395 (1951); *NLRB* v. *Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 66 (1964).[10]

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[10]The *Islesboro* court, commenting on a very brief summary Senator Bayh asked to have printed in the record (118 Cong.

Finally, the construction of Section 901 of Title IX to cover discrimination in employment practices is supported by the rejection by the conference committee of a provision excluding such practices from the types of discrimination for which the fund termination mechanism is an available sanction. The House version had included the following provision, parallel to Section 604 of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d-3 (117 Cong. Rec. 39365 (1971)):

> SEC. 904. Nothing contained in this title shall be construed to authorize action under this title by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

The Conference Report notes, but gives no explanation for, the deletion of this provision (H.R. Rep. No. 92-1085, 92d Cong., 2d Sess. 221 (1972)). In view of the fact, however, that the counterpart in Title VI of the 1964 Act was added to give precise definition to the intended scope of the basic prohibition in Section 601 of that title, 42 U.S.C. 2000d (and therefore to foreclose courts from construing Section 601 to apply to employment discrimination other than the limited

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Rec. 5808 (1972)), concluded (593 F.2d at 428) that the section titles "Basic Prohibition," for what became Section 901 of Title IX, and "Employment Discrimination," for the section that would amend Title VII of the Civil Rights Act of 1964, indicated that Section 901 was not intended to cover employment discrimination. This is not a necessary inference, and, as we have demonstrated (page 15-17, *supra*), Senator Bayh's more extended description of this amendment shows it is an incorrect one. See *North Haven Board of Education* v. *Hufstedler*, *supra*, App. C, *infra*, 33a-37a; *Dougherty County School System* v. *Harris*, *supra*, 622 F.2d at 738.

category indicated in Section 604) (see 110 Cong. Rec. 12720 (1964) (remarks of Senator Humphrey)), it is reasonable to suppose that Congress intended to leave open for Section 901 of Title IX the interpretation it foreclosed in Title VI. As the court in *North Haven* correctly noted (App. C, *infra*, 42a):

> It is not enough * * * to say as * * * the other circuits have suggested that the deletion of this provision in conference was simply to avoid inconsistency with the other provisions of the bill proposing to amend Title VII and the Fair Labor Standards Act, since Congress could easily have drafted an employment exclusion applicable solely to the first portion of the Act.[11].

4. In construing Section 901 of Title IX as inapplicable to employment discrimination on the part of educational institutions that receive federal aid, the court below and the courts on whose decisions it has relied

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[11] Because the deleted language refers specifically to federal financial assistance, it would not, on its face, be applicable to the Title VII and Equal Pay Act amendments. A minor redrafting would thus have cured any inconsistency, *e.g.*, "[N]othing contained in this title shall be construed to authorize action under *sections 901 and 902* * * * with respect to any employment practice."

An amendment proposing language to the same effect was introduced in 1975 by an opponent of employment coverage, but it was never reported out of committee. S. 2146, 94th Cong., 1st Sess., 121 Cong. Rec. 23845-23847 (1975). An amendment limiting the coverage of Section 901 to the "curriculum or graduation requirements" of federally assisted institutions, introduced in 1976 (122 Cong. Rec. 28136 (1976)), was opposed by Senator Bayh, in part because it would exempt "employment" and other "areas of traditional discrimination." *Id.* at 28144. The amendment was defeated. *Id.* at 28147-28148.

have, as shown, glossed over plain language of the statute and misread clear indications of congressional intent in its legislative history. They have also ignored two fundamental guides to the construction of statutes and administrative regulations.

The first is that the contemporaneous construction of a statute by an agency "charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new" will not be overturned except for "very cogent reasons." *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933). This Court has held that such a construction should normally be accorded substantial deference. *Lau* v. *Nichols*, 414 U.S. 563 (1974); *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-434 (1971); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

In the present case, HEW has, pursuant to statutory command (20 U.S.C. 1682), issued regulations to effectuate its understanding of the purpose of Section 901 of Title IX, 20 U.S.C. 1681; its regulations have been approved by the President; and they have lain before Congress without a vote of disapproval. It is true that the failure of Congress to disapprove the regulations may not be construed as congressional approval (see 20 U.S.C. 1232(d)(1)). Nevertheless, it is not insignificant that since the time that HEW published its regulations for comment, including the employment practices regulations at issue here (39 Fed. Reg. 22228, 22236-22238 (1974)), Congress has twice amended 20 U.S.C. 1681 without adding any provision that would invalidate the employment practices regu-

lations (88 Stat. 1862 (1974); 90 Stat. 2234 (1976)); and the second of those amendments was passed after the regulations had been issued in final form (40 Fed. Reg. 24128, 24143-24144 (1975)) and reviewed by Congress (*Sex Discrimination Regulations: Hearings Before the Subcomm. on Postsecondary Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. (1975)). See the discussion in *North Haven* (App. C, *infra*, 42a-44a). As this Court has recently observed, while it is "not always * * * realistic to infer approval of a judicial or administrati[ve] interpretation from congressional silence alone," an agency's construction of a statute has considerable force if it has been brought to the attention of Congress and Congress has "not sought to alter that interpretation although it has amended the statute in other respects * * *." *United States* v. *Rutherford*, 442 U.S. 544, 554 n. 10 (1979). See also *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974).

The decision below also conflicts with the principle that remedial civil rights legislation should be broadly interpreted in order to effectuate its purposes. *Daniel* v. *Paul*, 395 U.S. 298, 307-308 (1969); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968). The fact that employment coverage under Section 901 of Title IX overlaps the coverage of other legislation aimed at eliminating sex discrimination in employment does not nullify this general principle of construction. Although the courts may disagree with Congress' choice to disperse among several statutes and agencies the authority to combat such discrimination, they are not free to disregard and frustrate that plan as they have done here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1980

APPENDIX A

United States Court of Appeals

FOR THE NINTH CIRCUIT

No. 78-1746
DC #C77-631S
June 19, 1980

SEATTLE UNIVERSITY, A WASHINGTON NONPROFIT CORPORATION, PLAINTIFF-APPELLEE,

v.

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, AN AGENCY OF THE UNITED STATES OF AMERICA, DEFENDANT-APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

OPINION

Before: CHOY and FERGUSON, *Circuit Judges*, and BARTELS,* *District Judge*

PER CURIAM:

Section 901(a) of the Education Amendments of 1972, codified at 20 U.S.C. § 1681(a),[1] prohibits dis-

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*The Honorable John R. Bartels, Senior United States District Judge for the Eastern District of New York, sitting by designation.

[1]Section 1681(a) provides in pertinent part:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits

crimination on the basis of sex under any education program or activity receiving federal financial assistance. The Department of Health, Education and Welfare ("HEW"), pursuant to 20 U.S.C. § 1682,[2] promulgated regulations designed to effectuate the directive of § 901(a). The regulations in dispute, 45 C.F.R. §§ 86.51-.61,[3] are addressed to the employment prac-

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of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

[2] Section 1682 provides in pertinent part:

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law . . . .

[3] 45 C.F.R. § 86.51 provides in pertinent part:

(a) *General.* (1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or

tices of educational institutions. The district court found these regulations invalid and enjoined their enforcement and the cutoff of assistance for noncompliance. We affirm.

Plaintiff Seattle University, a private university, received federal financial assistance for several of its programs. In June, 1975, the university was notified by HEW that a complaint charging sex discrimination in the award of salaries had been filed against the university by several faculty members in the School of Nursing. HEW initiated an investigation pursuant to Title IX. The university complied with several requests for information by HEW, but eventually refused to comply, charging that HEW had no authority under Title IX to conduct the investigation. The university, facing a cutoff in federal funds, filed suit for declaratory judgment and for injunctive relief.

After a hearing on cross-motions for summary judgment, the district court ruled that the adoption and issuance by HEW of the regulations at issue were in excess of the authority granted HEW by Congress under Title IX. HEW appeals.

HEW argues that both the language of the statute and the legislative history support its claim that Title IX protects employees. At the very least, it argues, HEW must be able to issue regulations which prohibit

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be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

sex discrimination in employment to the extent that it constitutes discrimination against students.

Three courts of appeal have held, in cases nearly identical to this case, that Title IX does not protect employees *qua* employees. *See Islesboro School Committee* v. *Califano*, 593 F.2d 424 (1st Cir.), *cert. denied*, 100 S.Ct. 467 (1979); *Junior College District of St. Louis* v. *Califano*, 597 F.2d 119 (8th Cir.), *cert. denied*, 100 S.Ct. 467 (1979); *Romeo Community Schools* v. *HEW*, 600 F.2d 581 (6th Cir. 1979).[4] Each of these courts has noted that neither the plain language of Title IX nor the legislative history support HEW's contention that Congress intended that the statute reach employment discrimination. *See, e.g., Islesboro, supra*, 593 F.2d at 426-28.[5]

Similarly, these decisions fully respond to HEW's argument that employment discrimination is proscribed under Title IX when that discrimination infects the beneficiaries of the federally assisted program.[6] *See, e.g., Islesboro, supra*, 593 F.2d at 430:

> This "infection theory," as it is called, has been approved where it has been shown that eliminating discrimination against students is impossible in the absence of eliminating discrimination

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[4]These courts, when combined, have invalidated 45 C.F.R. §§ 86.57(c), 86.51(a), 86.51(b)(3), and 86.54.

[5]The Supreme Court recently held that there is an implied private right of action under Title IX, but did not discuss whether employees are protected under that statute. *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979). *Cannon* involved an applicant for admission to medical school who alleged that she was denied admission because of her sex.

[6]This court has recognized ". . . HEW must have substantial latitude in scrutinizing policies and practices of the institution

> against faculty . . . . While the basic premise might be correct, that does not adequately underpin a grant of authority to HEW to promulgate broad-ranging regulations canvassing employment-related discrimination. A nexus between the discrimination against employees and its effect on students must first be shown.

Id. (Citations and footnote omitted).

Each argument raised by HEW on this appeal has been thoroughly addressed by the three courts of ap-

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that may have a discriminatory impact on the intended beneficiaries of assistance." *United States* v. *El Camino Community College District*, 600 F.2d 1258, 1260 (9th Cir.), *cert. denied*, 100 S.Ct. 661 (1979). In that case, HEW sued to compel a college to supply information about its workforce pursuant to regulations (45 C.F.R. § 80) promulgated under Title VI. On appeal, the college argued that the regulations were in excess of statutory authority because they authorize the agency to investigate activities which do not receive federal assistance. The court did not reach the issue because the college had not raised the argument in the district court, but the court noted the necessity for latitude in *investigatory* regulations. The regulation primarily at issue there (45 C.F.R. § 80.4(d)) requires every applicant for federal financial assistance to execute an assurance of compliance with HEW regulations, and imposes an open-file examination of the applicant's records and programs. The regulation is applicable to the entire institution unless the institution establishes that some of its practices in no way affect its practices in the program for which federal aid is sought or the beneficiaries of such programs. No such "nexus" is provided in the regulations at issue here. The regulations at issue here prohibit sex discrimination in employment without requiring that any discriminatory effect on students as a result of the discrimination against the employees first be shown, as is required by the "infection" cases relating to racial discrimination in the schools and relied on by HEW: *United States* v. *Jefferson County Board of Education*, 372 F.2d 836 (5th Cir. 1966), *cert. denied sub nom. Caddo Parish School Board* v. *United States*, 389 U.S. 840 (1967); and *Board of Public Instruction of Taylor County* v. *Finch*, 414 F.2d 1068 (5th Cir. 1969).

peal cited above and by the district court. We agree with their decisions, and we find it unnecessary to add to their discussions. The decision of the district court is AFFIRMED.

APPENDIX B

United States District Court

WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C77-631S

SEATTLE UNIVERSITY, A WASHINGTON NONPROFIT CORPORATION, PLAINTIFF,

vs.

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, AN AGENCY OF THE UNITED STATES OF AMERICA, DEFENDANTS.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter having come on for hearing before the Honorable Morell H. Sharp on cross motions for summary judgment, plaintiff appearing by and through its attorneys, Moriarty, Long, Mikkelborg & Broz, by Robert J. Walerius and Douglas M. Duncan; defendant appearing through its attorney, John Merkel, United States Attorney, by Susan Barnes, Assistant United States Attorney, and Ricardo Cruz, Assistant General Counsel, Office of Civil Rights, Region X, Department of Health, Education and Welfare, and the Court having reviewed the pleadings, motions and affidavits on file, the briefs and memoranda of both parties, having heard argument of counsel and having been fully ad-

vised in these premises; NOW, THEREFORE, the Court does enter these

FINDINGS OF FACT

1. Seattle University is a Washington nonprofit corporation, having its principal place of business in Seattle, King County, Washington. Seattle University is a private institution of higher education.

2. Seattle University maintains certain educational programs and activities which receive financial assistance from defendant.

3. The University also maintains educational programs and activities which do not receive any federal financial assistance and operates other educational programs and activities which do receive such assistance, but from federal agencies other than defendant.

4. Defendant, Department of Health, Education and Welfare ("HEW"), is a federal department within the meaning of the Education Amendments of 1972, Title IX, § 902 (20 U.S.C. § 1682), and pursuant thereto has issued final regulations entitled "Nondiscrimination on the Basis of Sex in Educational Programs and Activities Receiving or Benefitting from Federal Financial Assistance," 45 C.F.R. Part 86.

5. By Subpart E of these regulations, 45 C.F.R. 86.51–.61, HEW purports to regulate employment practices in *all* educational programs and activities operated by recipients of federal financial assistance. See, 45 C.F.R. § 86.51.

6. Section 86.54 of Subpart E prohibits a recipient of federal financial assistance from making or enforcing

any policy or practice which discriminates between employees in rates of pay or other compensation on the basis of sex.

7. On or about June 27, 1975, Seattle University was notified in writing by HEW that a complaint alleging sex discrimination in the award of salaries under Title IX of the Education Amendments of 1972 had been filed against the University by certain faculty members in its School of Nursing. No students have joined in the complaint.

8. Pursuant to said complaint, defendant has undertaken a lengthy and exhaustive investigation of Seattle University's employment practices as they relate to salaries of faculty in the School of Nursing and all other faculty members at Seattle University.

9. Dr. William A. Guppy is the Academic Vice President of Seattle University, and has personally spent approximately 200 hours in accumulating requested data.

10. HEW's investigation is ongoing and continuing, but Seattle University has not complied with HEW's most recent demand for information and records, on the basis that HEW does not have legal authority to conduct the investigation despite the existence of the HEW regulations passed pursuant to Title IX. This investigation was preliminarily enjoined by this Court pending the outcome of this hearing.

11. Unless a permanent injunction is entered, HEW will find the University in noncompliance and will commence enforcement proceedings. If enforcement proceedings are commenced by HEW, the University

will suffer irreparable injury, loss and damage, including but not limited to loss of federal funds, loss of public confidence and reputation, reduction in private donations, and loss of students.

12. Seattle University has posted with this Court a surety bond in the amount of $1,000.00.

13. There is no genuine issue as to any material fact.

From the foregoing Findings of Fact, the Court now makes and enters the following

CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties and the subject matter of this controversy.

2. Regulations issued by HEW entitled "Nondiscrimination on the Basis of Sex in Educational Programs and Activities Receiving or Benefitting from Federal Financial Assistance," 45 C.F.R. Part 86, are final regulations and are, accordingly, subject to judicial review.

3. There is an actual controversy between the parties which is ripe for judicial resolution.

4. The University is not foreclosed from bringing this action by virtue of the fact that it has not yet been actually found in noncompliance with Title IX, § 901 *et seq.* (20 U.S.C. § 1681) nor that it has not actually had its federal funding terminated by HEW.

5. Forcing the University to exhaust the administrative compliance procedures would be inappropriate and of no value in resolving the question of HEW's un-

derlying authority to promulgate the regulations at issue here.

6. Though cast in broad terms, the prohibitory language of 20 U.S.C. § 1681 (§ 901 of Title IX), nevertheless addresses itself only to sex discrimination against the participants in and the beneficiaries of federally assisted education programs. Section 1681 must, therefore, be read to protect from sex discrimination only those persons for whom the federally assisted education programs are established. If the federally funded education program is established for the purpose of educating students, then it is the students who are protected by § 1681. Section 1681 does not protect the teachers, secretaries, administrators, or other personnel who are employed to staff the program.

7. If an education program is designed to aid a faculty member, e.g. a federal research grant, § 1681 protects from sex discrimination those faculty members who apply for and/or receive the research grant. However, the protection afforded the person is not in his/her capacity as an *employee*, but in his/her capacity as a direct beneficiary of a federally assisted education program.

8. This construction of § 1681 is borne out by the series of coverage exclusions provided in § 1681, all of which relate to student activity or enrollment. Not one of the exclusions involves a federally assisted education institution's employment practices. The explanation for this is: (1) either Congress meant to allow wide-open coverage of employment practices under § 1681 while closely regulating § 1681 coverage in all other respects, or (2) and what appears more likely,

Congress never meant to include employment practices within the coverages of § 1681 in the first place.

9. Section 1681 encompasses discrimination in only those specific education "programs and activities" that receive federal financial assistance. This conclusion is borne out by the plain language of § 1681. This language clearly directs that in determining the scope of the statutory prohibition, the threshold question is whether a specific education program or activity operated by an institution receives federal funding. HEW's interpretation (contained in its Title IX regulations) of § 1681's prohibitory scope turns the threshold question and, thus, the statute, around. Under HEW's Title IX employment regulations, the threshold question is whether an educational institution is merely a recipient of federal funds. If the institution receives any federal funds—even to a single program—then HEW can, in its view, regulate *all employment* practices in all educational programs operated by the institution. This interpretation is erroneous.

10. The words "program or activity" mean that which is authorized by and funded under federal education grant statutes. The words do not refer to the entire operation of the recipient institution, but only to the federally funded programs operated by such institution. *Romeo Community Schools* v. *HEW* (E.D. Mich., April 7, 1977), Slip Op. p. 24, n. 18; *Board of Public Instruction of Taylor County* v. *Finch*, 414 F.2d 1068, 1077 (5th Cir., 1969). The prohibitory scope of § 1681 is, thus, "program specific" i.e., HEW has authority to regulate sex discrimination only in those specific programs which receive federal funding from

HEW. It does not have authority to regulate discrimination in every University program or activity.

11. An analysis of 20 U.S.C. § 1682 (§ 902 of Title IX) buttresses the conclusions that (1) employees of an educational institution are not protected persons under § 1681, and (2) the prohibitory scope of § 1681 is "program specific". First, § 1682 grants Federal agencies, like HEW, only one method of directly enforcing compliance with Title IX:

> ". . . termination of or refusal to grant or to continue assistance under such program or activity to any recipient [found to be in noncompliance] . . . ."

In the case of employment discrimination, this sanction is of limited enforcement value and has little or no justification. Since the funds provided by HEW to create programs and activities which are designed to educate students who participate in them, a cutoff of HEW funding would necessarily punish the students. Punishment of students in the affected programs is a particularly anomolous result since the sanction is not being imposed for the purpose of enforcing *their* rights. An ironic result of the imposition of this sanction is that with the program's funding cut off, the teachers and other employees who staff the program may be laid off. Since it is doubtful that Congress intended to resort to such an arbitrary enforcement measure to protect employee rights, it is similarly doubtful that Congress intended by § 1681 to protect employees at all. On the other hand, in a situation where students or other direct beneficiaries of federally funded programs are themselves the victims of

discrimination in that program, the cutoff of funds has obvious justification and enforcement value.

12. The fact that HEW may also enforce compliance with § 1681 ". . . by any other means authorized by law . . ." e.g., referring the case to the Department of Justice for some unspecified action, does not alter the conclusion that employees are not protected by § 1681. It is doubtful that Congress intended HEW to regulate employment discrimination, yet deny HEW the power to directly act to prevent such discrimination. As noted above, the sanction of aid termination is unreasonable and unjustified in cases of employment discrimination. This necessarily means that HEW's sanction or enforcement authority in Title IX employment discrimination cases would be to refer the case to the Department of Justice. This is a rather weak sanction to prevent employment discrimination and is, in turn, evidence that Congress never intended HEW to regulate employment practices under § 1681.

13. Secondly, § 1682 provides that HEW's authority to terminate federal funds for noncompliance with § 1681 must be ". . . limited in its effect to the particular program, or part thereof, in which such noncompliance has been found . . ." Thus, the only direct sanction provided by § 1682 for use by Federal agencies is a "program specific" one. HEW is prohibited from terminating the financial assistance to some programs in an educational institution's curriculum simply because another program is not in compliance with § 1681.

14. Since both §§ 1681 and 1682 are "program specific", HEW's regulation of *general employment* prac-

tices is inappropriate and unauthorized. This is because such regulation is inherently non-"program specific". In the case of faculty employees, an education institution's employment policies are general in nature, covering *all* faculty employees involved in *all* of an institution's education programs, whether the programs be federally funded or not. HEW's employment regulations prohibit sex discrimination against an employee ". . . under *any* education program or activity operated by a recipient . . ." and provide that an educational institution ". . . shall make all employment decisions in *any* education program or activity operated [by it] . . . ." 45 C.F.R. § 86.51 (emphasis added). These regulations are patently overbroad and exceed the scope of the authority granted to HEW under Title IX.

15. The legislative history of Title IX, treated in great detail by the parties, supports these conclusions.

16. HEW's argument that its interpretation of Title IX as covering employment discrimination is entitled to "great deference by the court" is unpersuasive. While it is ordinarily true that the administrative construction will be affirmed if it has a reasonable basis in law, the Supreme Court has stated, "the courts are the final authorities on issues of statutory construction, . . . and 'are not obliged to stand aside and rubberstamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate, or that frustrate the congressional policy underlying a statute.' (Citations omitted)." *Federal Maritime Commission* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 745-46 (1973).

17. The court is similarly unpersuaded by HEW's "infection theory" argument. This theory has apparently only been recognized in Title VI (Civil Rights Act of 1964) and Fourteenth Amendment cases involving a very limited fact situation: dual school systems which claim to have effected desegregation notwithstanding the fact that complete racial segregation of faculty was maintained. Under the "freedom of choice" desegregation plans involved in those cases, the presence of a completely segregated faculty in a school conveyed a clear and unmistakable message to students as to which school they were expected to "choose".

18. Whatever validity the infection theory may have rests upon an effort to protect *students* from discrimination. This effort was quite clearly the focus of the cases which have recognized the theory. However, an effort to protect students is neither the focus of the HEW Title IX employment regulations, nor of its investigation in the instant case. These regulations and this investigation are clearly directed to one goal and one goal only: the protection of *employees per se*, not students who might possibly be "infected" by employee discrimination. There is no provision in the HEW regulations which specifies that the particular employment practice regulated must result in sex discrimination against students in federally financed education programs, nor does it appear that HEW considers itself under any obligation to establish such resultant student discrimination before the requirements of Subpart E may be enforced. Indeed, in the instant

case, HEW instituted the investigation pursuant to an employee complaint, not the complaint of a *student*.

19. HEW's adoption and issuance of Subpart E of its Title IX regulations, 45 C.F.R. §§ 86.51-.61, are in excess of the authority conferred by Congress upon HEW in Title IX, § 901 *et seq.* (20 U.S.C. § 1681 *et seq.*).

20. Seattle University should be granted a declaratory judgment that Subpart E of HEW's Title IX regulations and all actions and proceedings taken by HEW pursuant thereto with respect to Seattle University are invalid and void and of no effect whatsoever.

21. Seattle University should be granted a declaratory judgment that HEW may not terminate or refuse to grant or refuse to continue federal financial assistance to Seattle University under Title IX, § 901 *et seq.*, unless HEW finds, in accordance with Title IX, § 901 *et seq.*, that the University's federally funded programs are in noncompliance with Title IX, § 901 *et seq.*, and valid regulations enacted pursuant thereto.

22. The preliminary injunction previously issued in this action should be incorporated into a permanent injunction against HEW, its secretary, its other agents and employees and those persons in active concert or participation with them.

23. The bond posted by the University should be exonerated.

The Clerk of this Court is instructed to send uncertified copies of these Findings of Fact and Conclusions of Law to all counsel of record.

DATED at Seattle, Washington, this 3rd day of January, 1978.

/s/ MORRELL E. SHARP
UNITED STATES DISTRICT JUDGE

☆U.S. GOVERNMENT PRINTING OFFICE: 1980 328655 79

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1022-24—September Term, 1979

(Argued April 24, 1980 Decided July 24, 1980)

Docket Nos. 79-6136, -6247, -7747

NORTH HAVEN BOARD OF EDUCATION,

Plaintiff-Appellee,

v.

SHIRLEY M. HUFSTEDLER, *et al.*,

Defendants-Appellants.

TRUMBULL BOARD OF EDUCATION

Plaintiff-Appellee,

v.

UNITED STATES DEPARTMENT OF EDUCATION and LINDA POTZ,

Defendants-Appellants.

B e f o r e :

KAUFMAN and OAKES, *Circuit Judges*,
and TENNEY, *District Judge*.*

Appeal from orders of summary judgment in the United States District Court for the District of Connecticut, Ellen Bree Burns, *Judge*, declaring regulations governing sex discrimination in employment issued by the Department of Health, Education and Welfare (now adopted by the Department of Education) invalid and enjoining the Department from withholding or threatening to withhold any federal funds under those regulations.

The Court of Appeals held that the employment discrimination regulations contained in 45 C.F.R. Part 86, Subpart E (now in 34 C.F.R. Part 106, Subpart E (May 9, 1980)) were authorized under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, and hence were valid and enforceable.

Judgments reversed and cases remanded.

MARIE E. KLIMESZ, United States Department of Justice, Washington, D.C. (Drew S. Days III, Assistant Attorney General, Washington, D.C., Richard Blumenthal, United States Attorney for the District of Connecticut, and Brian

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* Of the Southern District of New York, sitting by designation.

K. Landsberg, United States Department of Justice, Washington, D.C., of counsel), *for Appellants Shirley M. Hufstedler et al. and United States Department of Education.*

BEVERLY J. HODGSON, Bridgeport, Conn. (Koskoff, Koskoff & Bieder, Bridgeport, Conn., of counsel), *for Appellant Linda Potz.*

SUSAN K. KREEL, Hartford, Conn. (Siegal, O'Connor & Kainen, Hartford, Conn., of counsel), *for Appellee North Haven Board of Education.*

PAUL E. KNAG, Bridgeport, Conn. (Cummings & Lockwood, Richard W. Rutherford, Bridgeport, Conn., of counsel), *for Appellee Trumbull Board of Education.*

OAKES, *Circuit Judge:*

Cognizant that four other courts of appeals and a number of district courts have held otherwise, we nevertheless are convinced after extreme care and consideration that regulations issued by the United States Department of Health, Education and Welfare (HEW)[1] concerning sex discrimination in educational

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1 At the time these suits were brought and appealed, the regulations in questions were printed at 45 C.F.R. Part 86, Subpart E, under the auspices of HEW. Since the jurisdiction over educational matters was transferred to the new Department of Education on May 4, 1980, these regulations have been reissued in identical form by that department at 34 C.F.R. Part 106, Subpart E, 45 Fed. Reg. 30802

employment are valid under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, as properly construed. Accordingly, we reverse the decisions of the United States District Court for the District of Connecticut, Ellen Bree Burns, Judge, which declared those regulations invalid and which enjoined HEW from withholding educational funding from two Connecticut school districts, North Haven and Trumbull, respectively.

FACTS

Two separate cases are here involved and they will be treated separately for factual purposes even though they both involve the same essential legal question.

I. *North Haven*—North Haven receives federal financial aid for its educational programs and activities, and hence is governed by the provisions of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, barring discrimination on the basis of sex. Since the 1975-76 school year, North Haven has used between 46.8% and 66.9% of its federal financial assistance to pay salaries of its employees and is expected to continue doing so.

On January 10, 1978, in response to a private complaint alleging that the North Haven Board of Education was violating Title IX by refusing to rehire a tenured teacher who had taken a one-year maternity leave, HEW requested North Haven to provide specific information concerning its policies on hiring, leaves of

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(May 9, 1980). To be consistent with the briefs of the parties and the district court decision, however, we will continue to refer throughout this opinion to the regulations promulgated by HEW and to HEW's authority under Title IX.

absence, seniority, and tenure. North Haven did not do so, asserting that HEW lacked authority to regulate employment practices under Title IX. When HEW notified the school district that the matter had been referred to its appropriate office for possible administrative enforcement proceedings, North Haven brought this action seeking declaratory and injunctive relief. The complaint alleged that the promulgation by HEW of the regulations contained in 45 C.F.R. Part 86, Subpart E, "was in excess of the statutory authority conferred by Congress in Section 902" of Title IX, 20 U.S.C. § 1682. After HEW moved in the alternative for dismissal or summary judgment and North Haven filed a cross-motion for summary judgment, the district court granted North Haven's motion for summary judgment on April 26, 1979.

II *Trumbull*—Appellant Linda Potz, a former guidance counselor in the Trumbull public schools, filed an administrative complaint with HEW alleging that the Trumbull Board of Education had discriminated against her on the basis of sex by giving her inferior job assignments, by providing her with inferior working conditions, and by not renewing her contract. The Trumbull board acknowledged receiving "substantial" federal financial assistance, although it is unclear how much, if any, of that assistance was used for guidance counseling. HEW determined that Trumbull had indeed violated Title IX by requiring Potz to perform typing and to run errands not required of male counselors, by moving her office to a smaller, poorly heated, and less comfortable space in the gymnasium away from the other counselors, by asking her to change a report showing that she had seen many more students in a given week than the number seen by her male

counterparts, and by not renewing her contract on the basis of her sex. On September 20, 1978, HEW notified the board that the school district was in violation of Title IX and ordered Trumbull to take corrective action including the reinstatement of Potz. Trumbull did not take such corrective action and instead filed this action for declaratory and injunctive relief against both HEW and Potz challenging HEW's authority to issue Subpart E, as in the North Haven case. The district court granted Trumbull's motion for summary judgment on May 24, 1979, based on its prior decision in North Haven, and on September 13, 1979, denied Potz's timely-filed motion to set aside the prior order of summary judgment and denied her motion for summary judgment.

THE DECISION BELOW

In each case, the district court declared Subpart E invalid and enjoined the federal defendants from interfering with federal financial assistance to plaintiffs for any alleged noncompliance with Subpart E. In holding that the prohibitions of Title IX do not apply to employment practices of educational institutions, the district court reached the same conclusion reached by a number of other courts.[2]

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2 *Seattle University v. HEW*, No. 78-1746 (9th Cir. June 19, 1980) (per curiam) (affirming 16b FEP Cases 719 (W.D. Wash. 1978)); *Romeo Community Schools v. HEW*, 600 F.2d 581 (6th Cir.), *cert. denied*, 100 S. Ct. 467 (1979) (affirming 438 F. Supp. 1021 (E.D. Mich. 1977)); *Junior College District of St. Louis v. Califano*, 597 F.2d 119 (8th Cir.), *cert. denied*, 100 S. Ct. 467 (1979) (affirming 455 F. Supp. 1212 (E.D. Mo. 1978)); *Islesboro School Committee v. Califano*, 593 F.2d 424 (1st Cir.), *cert. denied*, 100 S. Ct. 467 (1979) (affirming *Brunswick School Board v. Califano*, 449 F. Supp. 866 (D. Me. 1978)); *Grove City College v. Harris*, No. 78-1293 (W.D. Pa. March 10, 1980); *Auburn School District v. HEW*, No. 78-154

Section 901(a) of Title IX, 20 U.S.C. § 1681(a), provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

In first granting summary judgment to North Haven, the district court relied principally on the reasoning of another district court in *Romeo Community Schools v. HEW*, 438 F. Supp. 1021 (E.D. Mich. 1977), *aff'd*, 600 F.2d 581 (6th Cir.), *cert. denied*, 100 S. Ct. 467 (1979). The district court held that § 901(a) "does not cover the employment practices of educational institutions," but rather only prohibits "sex discrimination against students and other direct beneficiaries of federal educational assistance funds." Aware that Title IX was patterned after Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, but without a provision similar to § 604 of Title VI excluding employment from the coverage of the statute,[3] the district court

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(D.N.H. March 29, 1979), *appeal dismissed*, No. 79-1261 (1st Cir. 1980); *Board of Education of Bowling Green City District v. HEW*, No. C78-177, 19 FEP Cases 457 (N.D. Ohio March 14, 1979); *University of Toledo v. HEW*, 464 F. Supp. 693 (N.D. Ohio 1979); *Dougherty County School System v. Califano*, No. 78-30-ALB, 19 FEP Cases 688 (M.D. Ga. August 22, 1978), *appeal docketed*, No. 78-3384 (5th Cir. Nov. 1, 1978).

3 Section 604 of Title VI, 42 U.S.C § 2000d-3 provides:

> Nothing contained in this subchapter shall be construed to authorize action under this subchapter by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

concluded that such a provision was omitted from Title IX because it would have been inconsistent with other portions of the Title IX legislative package pertaining to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, and to the Equal Pay Act, 29 U.S.C. § 206(d), rather than because Congress intended that employment be covered under § 901. The court also noted that § 901(a) on its face "addressed itself only to sex discrimination against the participants in and the beneficiaries of federally assisted education programs," and that the express exclusions from coverage of § 901(a)[4] "relate solely to student activity or enrollment."

The court further relied on the fact that "[t]ermination of federal funds is the only sanction authorized" under Title IX and wondered whether Congress would have authorized termination of funds for a school program, thereby penalizing the students, where more effective and less costly alternative methods of prohibiting employment discrimination were readily available. *See* Kuhn, *Title IX: Employment and Athletics Are Outside HEW's Jurisdiction*, 65 Geo. L.J. 49, 61-62 (1976). Moreover, under § 902 of the Act, 20 U.S.C. § 1682, the district court noted that any termination of funds is "limited in its effect to the particular program, or part thereof, in which . . . noncompliance has been . . . found,"[5] and that

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4 Section 901(a) contains nine express exclusions from coverage under the basic prohibition, none of which specifically mentions employment.

5 Section 902 of Title IX, 20 U.S.C. § 1682, provides:

> Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract

regulation of employment practices is inherently "non-program specific." In ruling against appellants, the court also noted that because Subpart E prohibits discriminatory employment practices "for their own sake" these regulations cannot be upheld on the so-called "infection theory" utilized in other cases—*i.e.*, that employment discrimination has an adverse effect upon the students themselves.[6]

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of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

6 *See Caulfield v. Board of Education of the City of New York*, 583 F.2d 605, 610-11 (2d Cir. 1978); *United States v. Jefferson County Board of Education*, 372 F.2d 836, 882-86 (5th Cir. 1966), *adopted en banc per curiam*, 380 F.2d 385 (5th Cir.) *cert. denied*, 389 U.S. 840 (1967).

Later, in a separate opinion ruling in favor of Trumbull, the district court concluded that the Supreme Court's decision in *Cannon v. University of Chicago,* 441 U.S. 677 (1979) (Title IX permits private right of action), did not affect its ruling, and adopted the reasoning of the court of appeals in *Romeo Community Schools v. HEW,* 600 F.2d 581 (6th Cir.), *cert. denied,* 100 S. Ct. 467 (1979), rejecting HEW's interpretation of the legislative history of Title IX. In the district court's view, the legislative history suggested "that Title IX's focus was upon students and other direct beneficiaries."

DISCUSSION

As in any other problem of statutory interpretation we must examine the words of the statute, the legislative history, and the statutory purpose to be served. We may also be aided by examining analogous statutes or statutes *in pari materia* as well as by applicable canons of construction, one of which in the immediate context is to give due weight to the contemporaneous construction of a statute by the agency charged with its administration. *See NLRB v. Bell Aerospace Co.,* 416 U.S. 267, 274-275 (1974); *Griggs v. Duke Power Co.,* 401 U.S. 424, 433-34 (1971). In determining what weight is due, however, as Judge Learned Hand once put it:

> it is doubtful whether in the end one can say more than that there comes a point at which the courts must form their own conclusions. Before doing so they will, of course,—like the administrative tribunals themselves—look for light from every quarter, and after all crannies have been searched,

> will yield to the administrative interpretation in all doubtful cases; but they can never abdicate.

Niagara Falls Power Co. v. FPC, 137 F.2d 787, 792 (2d Cir.), *cert. denied*, 320 U.S. 792 (1943).

HEW argues that the language of § 901(a) clearly encompasses employment discrimination. The argument is that the general category of "person[s]" protected by § 901(a), 20 U.S.C. § 1681(a), is not limited to any particular class of persons and is subject only to the nine express exclusions set out thereafter. Obviously the persons include students and, HEW argues, equally clearly include employees of a university, college or school district who are in a position to "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under" federally funded education programs or activities. However, this language is more ambiguous than HEW suggests. The First Circuit, for example, thought in *Islesboro School Committee v. Califano*, 593 F.2d 424, 426 (1st Cir.), *cert. denied*, 100 S. Ct. 467 (1979), that this language, "on its face, is aimed at the beneficiaries of the federal monies, *i.e.*, either students attending institutions receiving federal funds or teachers engaged in special research being funded by the United States government." Indeed, it was due to the ambiguity of the virtually identical language in § 601 of Title VI, 42 U.S.C. § 2000d, and the confusion generated by it, that Congress found it necessary later to enact § 604 of Title VI, 42 U.S.C. § 2000d-3, barring application of Title VI to employment. *See* Kuhn, *supra*, 65 Geo. L.J. at 53-54. We hence must look beyond the language of the statute itself to determine its meaning.

HEW argues that its interpretation of § 901(a) is supported by the fact that none of the nine specific exemptions from the coverage of the statute contained in § 901(a)(1)-(9), 20 U.S.C. § 1681(a)(1)-(9), removes employment from the basic prohibition. We note that Paragraphs (a)(3) and (4) exclude religious and military institutions from the application of the statute and that the remaining exclusions exempt certain practices of otherwise covered institutions. It is true as HEW contends that none of these exemptions addresses the question of employment discrimination or in any way suggests that employment practices are excluded from the basic prohibition of the statute. But, as the Sixth Circuit has said, this argument "cuts both ways." *Romeo Community Schools, supra,* 600 F.2d at 584. While we cannot agree with HEW that the failure of the exclusions to mention employment is clear support for its position, we also cannot agree with the Sixth Circuit that because the exceptions relate to students "[i]t may be fairly assumed" that only students are the subject of § 901. *Id.* Indeed, Paragraphs (a)(3) and (4) do not mention students at all, but rather exempt entire categories of institutions. The Sixth Circuit's "assumption" is precisely that, and whether it is "fair" or not depends on the legislative history and purpose of Title IX.

HEW is on somewhat firmer footing when it argues that although Title IX is modeled after Title VI of the Civil Rights Act of 1964, *see Cannon v. University of Chicago, supra,* 441 U.S. at 694-96, Title IX conspicuously omits Title VI's exclusion of employment practices contained in 42 U.S.C. § 2000d-3,[7] even

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[7] *See* note 3 *supra*.

though the House proposed to include an equivalent provision in Title IX.[8] But the First and Sixth Circuits, as well as the court below, have taken the position that the House proposal was not ultimately included in Title IX because it would have been inconsistent with the sections of Title IX pertaining to employment discrimination under Title VII of the 1964 Civil Rights Act and the Equal Pay Act. *Islesboro School Committee, supra,* 593 F.2d at 428; *Romeo Community Schools, supra,* 600 F.2d at 584. *See also* Kuhn, *supra,* 65 Geo. L. J. at 57 ("The inclusion of section 904 in the bill was nothing more than a drafting mistake.") Again, we are pointed to a careful examination of the legislative history and purpose of the statute to determine whether HEW's conclusion or that of these other courts is the correct one.

In our view the legislative history, closely examined, supports HEW rather than the various court decisions which we have mentioned above. The Supreme Court has informed us of the overall objectives Congress sought in enacting Title IX:

> First, Congress wanted to avoid the use of federal resources to support discriminatory practices; second, it wanted to provide individual citizens effective protection against those practices.

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8 *See* H.R. Rep. No. 554, 92d Cong., 1st Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2462, 2566. The Conference Committee Report contains the following:

> (f) In addition, the House amendment, but not the Senate amendment, provided that nothing in the title authorizes action by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment. The House recedes.

Id. at 2671-72.

Cannon, supra, 441 U.S. at 704. We turn then to the actions of each House and of the conference committee to make the determination whether interpreting Title IX to cover employment discrimination is consistent with these congressional objectives.

When we look at the Senate we note that on August 5, 1971, Senator Bayh introduced an amendment to a pending higher education bill, S. 659, for the purpose of prohibiting sex discrimination by certain educational institutions. In introducing his amendment he stated:

> While over 50 percent of our population is female, there is no effective protection for them as they seek admission *and employment* in educational facilities. The antidiscrimination provisions of the Civil Rights Act of 1964 do not deal with sex discrimination by our institutions of higher learning.
>
> * * * * *
>
> Today, women seeking *employment* in higher education face an array of obstacles almost as insuperable as those which used to face blacks.

117 Cong. Rec. 30155-56 (1971) (emphasis added). The next day, Senator McGovern stated his support for Senator Bayh's amendment, and in doing so referred to statistics that only nine percent of America's college professors were women, only six percent of law school students were women, and only eight percent of medical school students were women. 117 Cong. Rec. 30411 (1971). Senator Bayh's 1971 amendment did not come to a vote, since it was ruled "nongermane." *See* 118 Cong. Rec. 5808 (1972). Senator Bayh's remarks quoted above indicate at least an initial intention on his

part to prohibit employment discrimination under the provision of his 1971 amendment which subsequently formed the basis of § 901.

Senator Bayh introduced a new version of his amendment on February 28, 1972, as Amendment No. 874 to S. 659, which was still under consideration by Congress. 118 Cong. Rec. 5802-03 (1972). In addition to the provisions of the 1971 proposal, Senator Bayh included provisions amending Title VII of the Civil Rights Act of 1964 and amending § 13(a) of the Fair Labor Standards Act, 29 U.S.C. § 213(a), to exempt from the scope of that subsection the Equal Pay Act, 29 U.S.C. § 206(d).[9] The amendment was passed by the Senate the same day it was introduced. 118 Cong. Rec. 5815 (1972).

In introducing his amendment, Senator Bayh stated that "sex discrimination reaches into all facets of education—admissions, scholarship programs, *faculty hiring and promotion, professional staffing,* and pay scales." 118 Cong. Rec. 5803 (1972) (emphasis added). The Senator went on to say:

> Amendment No. 874 is broad, but basically it closes loopholes in existing legislation relating to general education programs *and employment resulting from those programs* . . . . More specifically, *the heart of this amendment* is a provision banning sex discrimination in educational pro-

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9 That portion of Senator Bayh's amendment dealing with Title VII, contained in § 1005 of the amendment, was not ultimately enacted as part of Title IX because a similar provision had already been enacted as §§ 2 and 3 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e(a) and 2000e-1. The portion of the amendment dealing with the Equal Pay Act, contained in § 1009 of the amendment, was enacted as § 906(b)(1) of Title IX and is now part of 29 U.S.C. § 213(a).

> grams receiving Federal funds. The amendment would cover such crucial aspects as admissions procedures, scholarships, and *faculty employment, with limited exceptions*. Enforcement powers include fund termination provisions—and appropriate safeguards—parallel to those found in title VI of the 1964 Civil Rights Act. *Other important provisions* in the amendment would extend the equal employment opportunities provisions of title VII of the 1964 Civil Rights Act to educational institutions, and extend the Equal Pay for Equal Work Act to include executive, administrative and professional women.

Id. (emphasis added). Other courts have interpreted these remarks concerning the coverage of employment to refer not to the part of Senator Bayh's amendment that later became § 901(a) of Title IX, 20 U.S.C. § 1681(a), but rather to the amendment's provisions removing the exemption in Title VII for educational institutions and extending the protection of the Equal Pay Act to executive, administrative and professional positions. But Senator Bayh in his quoted remarks quite clearly referred to "faculty employment" in conjunction with the basic prohibition of his amendment and *then* referred to the "[o]ther important provisions" dealing with Title VII and the Equal Pay Act.

After making these introductory remarks, Senator Bayh in a prepared summary of his amendment divided the amendment into four parts and discussed each separately. 118 Cong. Rec. 5806-08 (1972). The first part of his summary is labeled "A. Prohibition of Sex Discrimination in Federally Funded Education Programs." Under this heading, Senator Bayh describes the

basic prohibition against sex discrimination and the enforcement provisions, noting that these sections "generally parallel the provisions of title VI." *Id.* at 5807. He also discusses the exclusions from coverage in this category. It is in the second part of his discussion, labeled "B. Prohibition of Education Related Employment Discrimination," that Senator Bayh describes the amendments to Title VII and the Fair Labor Standards Act. While these headings at first blush tend to support the other courts' view, Senator Bayh's description of the *first* portion of his amendment shows that the basic prohibition of § 901 was meant to apply to employment discrimination:

> This portion of the amendment covers discrimination in all areas where abuse has been mentioned—*employment practices for faculty and administrators*, scholarship aid, admissions, access to programs within the institution such as vocational education classes, and so forth.

Id. (emphasis added).[10] This language strongly indicates that the first portion of the Act, containing § 901 and

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10 Senator Bayh made the following observations in introducing his revised amendment:

> I believe it is important to survey in some detail the scope of the problem in certain fundamental areas—hiring, scholarships, and admissions.
>
> A. Discrimination in Hiring and Promotion of Faculty and Administrators
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> Discrimination against females on faculties and in administration is well documented and widespread abuse is clear. I have been dismayed to learn of the double standard the academic community has applied to those women who choose to make education their life work. In spite of high academic standards, a woman who has met the rigorous standards for a Ph.D. program may suddenly find that these same schools do not have sufficient confidence in their own standards to hire the graduate to teach. A recent report on Columbia University practices found that

its enforcement provisions, relates not only to discrimination against students and other beneficiaries,

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although the percentage of doctorates award to women rose from 13 to 24 percent between 1957 and 1968, the percent of women in tenured positions at the graduate facilities have remained constant—at slightly over 2 percent. Similar situations exist, according to testimony during the 1970 hearings at numbers of other schools.

Although women comprised 6.9 percent of those enrolled in law school in 1969, a survey of 36 prominent law schools during 1968-70 showed that out of a total of 1,625 faculty members, only 35 or 2.1 percent were women, and 25 percent of those 36 were classified as librarians.

. . . .

Furthermore, the rule is that once hired, women do not receive advancement as often as men. While almost half of the male teachers are given the status of full professor, only 10 percent of the women make it that far. As a result, the highest faculty ranks are weighted with men; the lowest rank with women:

Present Rank	*Men*	*Women*
Professor	24.5%	9.4%
Associate professor	21.9%	15.7%
Assistant professor	28.2%	28.7%
Instructor and below	25.3%	46.2%

Finally, those women who are promoted often do not receive equal pay for equal work. In 1965-66, at the instructor's level, the median annual salary of women was $410 less than that of male instructors; at the assistant professor's level it was $576 less; at the associate professor's level, $742 less; and at the level of full professorship, it was $1,119 less. "Fact Sheet on the Earnings Gap," U.S. Department of Labor, Women's Bureau, 1970. According to testimony submitted during the "1970 Hearings, the women at the University of Pittsburgh calculated that the University was saving $2,500,000 by paying women less than they would have paid men with the same qualifications.

Preference for men over women to fill administrative posts is just as clear. For instance, Dr. Peter Muirhead, Associate Commissioner of Education, testified during the "1970 Hearings" that more than two-thirds of the teachers in elementary and secondary schools are women, but they constitute only 22 percent of the elementary school principals and only 4 percent of the high school principals. According to a recent study by the National Education Association, only two women can be found among 13,000 school superintendents.

(footnote continued on next page)

but also to "employment practices for faculty and administrators." The *second* portion applies "title VII's widely recognized standards of equality of employment opportunity to educational institutions" and ensures that "both men and women employees receive equal pay for equal work" at such institutions. *Id.*[11]

While we are well aware of Justice Jackson's warning against selecting casual statements from floor debates, *Schwegmann Brothers v. Calvert Distillers Corp.*, 341 U.S. 384, 395-96 (1951) (Jackson, J., concurring), we at least get further reinforcement of the principal sponsor's views as expressed above by looking at the

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> In higher education, female administrators are virtually nonexistent. Dr. Ann Scott, from the University of Buffalo, highlighted the "progressive evaporation of women as we climb the academic ladder" by pointing out that while women are only 5 percent of the full professors at that institution, they are even less—1 percent—of the top administration "1970 Hearings." [Sic.] Even at women's colleges there has been a decline in recent years in the number of high administrative posts held by women. And as Dr. Bernice Sandler pointed out in a recent speech, if it were not for female presidents at Catholic colleges, the number of women college presidents would be less than the number of whooping cranes.
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> 118 Cong. Rec. 5804-05 (1972).

11 There is some discrepancy in Senatory [*sic*] Bayh's breakdown of his amendment. The first part of his summary begins: "Central to my amendment are sections 1001-1005 . . . ." 118 Cong. Rec. 5807 (1972). Section 1005, however, is the section of Amendment No. 874 which contains the amendments to Title VII. Thus, an argument could be made that Senator Bayh's references to employment discrimination in this first portion actually are references to § 1005 rather than to the basic prohibition. It is clear from his discussion in the first two parts of the summary, however, that the first part was not meant to cover the Title VII provision, but only the basic prohibition, the enforcement mechanism and the exclusions. The discussion of the proposed amendment to Title VII does not come until the *second* part of the summary. Accordingly, we conclude that the mention of § 1005 of the amendment in the first part of the summary was simply an oversight.

debate on the Senate floor just prior to Senate passage of Title IX. In that debate Senator Pell, the floor manager of the entire education bill, addressed several questions to Senator Bayh concerning the scope of § 1001(a) and (b) of the Bayh Amendment, the predecessors of § 901(a) and (c) of Title IX. The following colloquy leaves little doubt that Senator Bayh intended employment practices to be covered under what is now § 901:

> MR. PELL. . . . Sections 1001(a) and (b) include all educational institutions which receive Federal assistance. This includes elementary and secondary schools as well. With regard to private undergraduate colleges, the Senator has excluded from coverage their admissions practices. Does the same exclusion apply to nonpublic institutions at the elementary and secondary level?
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> MR. BAYH. At the elementary and secondary levels, admissions policies are not covered. As the Senator knows, we are dealing with three basically different types of discrimination here. We are dealing with discrimination in admission to an institution, discrimination of available services or studies within an institution once students are admitted, *and discrimination in employment within an institution, as a member of a faculty or whatever.*
>
> *In the area of employment, we permit no exceptions.* In the area of services, once a student is accepted within an institution, we permit no exceptions. The Senator from Rhode Island asked

about admissions policies of private secondary and primary schools. They would be excepted.

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MR. PELL. . . . [D]o I understand the Senator to say that the faculty of private schools would have to reflect a sexual balance?

MR. BAYH. This amendment sets no quotas. It only guarantees equality of opportunity. The Senator from Indiana cannot be sure about the sexual balance in any faculty, but as far as employment opportunities are concerned, the answer would be "Yes."

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MR. PELL. Would this apply to a parochial school where they have nuns *as teachers?*

MR. BAYH. No. *There is an explicit exception for education institutions controlled by a religious organization.*

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MR. PELL. Mr. President, I refer to a preparatory school such as Peekskill Military Institute which is at the high school level. Would that school be expected to have *women teachers?*

* * * * *

MR. BAYH. *All military schools are excluded.*

118 Cong. Rec. 5812-13 (1972) (emphasis added).

It is clear from these questions and answers not only that Senator Bayh intended employment to be covered by § 901, but also that the exemptions for religious and military institutions now contained in § 901(a)(3) and

(4) apply to *employment* as well as to admissions and services. Obviously Senator Bayh's responses to Senator Pell that the employment practices of religious and military schools were covered by the exclusions in § 901(a) would make no sense if employment practices were not included within the scope of § 901(a) to begin with. Despite Justice Jackson's warning, such statements by the sponsor of a piece of legislation are at the very least helpful and may indeed be authoritative. *NLRB v. Fruit & Vegetable Packers & Warehousemen, Local 760*, 377 U.S. 58, 67-68 (1964); *Schwegmann Brothers, supra*, 341 U.S. at 394-95.

We also note that one month after the Higher Education Amendments of 1972 containing Title IX were signed into law by the President, Senator Bayh published in the Congressional Record a summary of the requirements of Title IX prepared by Dr. Bernice Sandler of the Association of American Colleges. That summary's description of the basic prohibition of § 901(a) included a footnote which noted the following differences between Title IX and Title VI:

> Apart from admission coverage . . ., the Higher Education Act differs from Title VI in that the sex discrimination prohibition is limited to federally assisted *education* programs and activities, whereas the race, color and national origin discrimination prohibitions are applicable to *all* federally assisted programs. Title VI also specifically excludes *employment* from coverage (except where the primary objective of the federal aid is to provide employment). There is no similar exemption for employment in the sex discrimination provisions relating to federally assisted education programs.

118 Cong. Rec. 24684 n.1 (1972) (emphasis in original). Thus, after the Act's passage, the primary sponsor of Title IX adopted a summary of that title which expressly noted the distinction between Titles VI and IX in terms of employment coverage.

Turning to the House of Representatives, the House version of the amendments to the Higher Education Act of 1965 was simultaneously being considered as H.R. 7248. A provision on sex discrimination in educational institutions, similar to that introduced by Senator Bayh, was included in the bill reported by the House Committee on Education and Labor. *See* H.R. Rep. No. 554, 92d Cong., 1st Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 2462, 2511-12, 2566-67. The principal difference was the inclusion of § 1004 in the House bill, paralleling the language of § 604 of Title VI, which we have discussed above. The House Committee report states:

> *Section 1004* provides that nothing in this title may be taken to authorize action by any department or agency with respect to any employment practice of any employer, employment agency, or labor organization except where a primary objective of the Federal financial assistance is to provide employment.

Id. at 2566 (emphasis in original). The Committee's bill was passed by the House on November 4, 1971 without any change in the provisions of § 1004 of the bill. 117 Cong. Rec. 39353-54 (1971). There was no specific discussion of § 1004 during the House debate. 117 Cong. Rec. 39248 *et seq.* (1971). As we have pointed out, this provision in the House bill went to the

conference committee, and the House receded. *See* note 8 *supra*.

It is not enough, we think, to say as the court below and the other circuits have suggested that the deletion of this provision in conference was simply to avoid inconsistency with the other provisions of the bill proposing to amend Title VII and the Fair Labor Standards Act, since Congress could easily have drafted an employment exclusion applicable solely to the first portion of the Act. For example, Congress could readily have said: "Nothing in § 901 shall apply to any employees of any educational institution subject to this title except where a primary objective of the Federal financial assistance is to provide employment." In light of the ease with which an appropriate employment exclusion could have been substituted, and in light of the Senate sponsor's view of his amendment as expressed in his summary and in the debates from which we have quoted above, we cannot agree that the omission was simply correction of a "drafting mistake." Rather, the deletion of the House provision supports HEW's broader interpretation of the Act. Appellees point us to no language anywhere in the legislative history that even suggests that the conference committee deleted the provision merely for reasons of consistency, and we have not been able to find any. In short, this was *not*, in our view, a matter of simply correcting legislative inadvertence.

It is not without significance that Congress itself undertook a statutorily mandated review of the Title IX regulations which are here challenged. That review procedure provided at the time that any regulation would become effective not less than 45 days after transmission "unless the Congress shall, by concurrent

resolution, find that the standard, rule, regulation or requirement is inconsistent with the Act from which it derives its authority, and disapprove such standard, rule, regulation or requirement." 20 U.S.C. § 1232(d)(1) (Supp. IV 1974). Senator Helms introduced such a concurrent resolution to disapprove all of the HEW regulations issued under Title IX including Subpart E. S. Con. Res. 46, 94th Cong., 1st Sess., 121 Cong. Rec. 17301 (1975). The resolution was referred to the Senate Committee on Labor and Public Welfare, which took no action on it. In the House, Representatives Quie and Erlenborn introduced an amendment to a concurrent resolution which amendment specifically sought to disapprove the employment sections of the regulations. Their amendment stated: "Subpart E . . . is inconsistent with the Act since by amendment to Title VII of the Civil Rights Act of 1964 and the Fair Labor Standards Act of 1938, Congress has conferred such jurisdiction upon the United States Equal Employment Opportunity Commission and the Department of Labor." Unpublished Amendment to H.R. Con. Res. 330, Hearings Before the Subcommittee on Postsecondary Education of the House Committee on Education and Labor, 94th Cong., 1st Sess. (1975) on file with that Committee. In testimony before the House Education and Labor Committee's Subcommittee on Postsecondary Education, Senator Bayh expressed support for the HEW regulations, stating that HEW's "[T]itle IX guidelines, as the Congress mandated, call for equality in admissions, financial aid, course offerings, career counseling, *and in the case of teachers and other educational personnel, employment, pay and promotions*." Sex Discrimination Regulations: Hearings Before the Subcommittee on Postsecondary Education of the

House Committee on Education and Labor, 94th Cong., 1st Sess. 173 (1975) (emphasis added). The concurrent resolution and amendment were never passed out of the Education and Labor Committee. Thus, no concurrent resolution was passed by either House, and HEW's regulations took effect.

Subsequent attempts to limit the scope of § 901 have also failed. Later in 1975, Senator Helms introduced a bill, S. 2146, proposing to amend § 901 along the lines that we have suggested could have been used by Congress in the first instance if Congress intended to exclude employment from coverage. His bill read in part: "Nothing in [§ 901 of Title IX] shall apply to any employees of any educational institution subject to this title." 121 Cong. Rec. 23845-47 (1975). His bill was not adopted. A year later, Senator McClure offered another amendment to limit the coverage of § 901 to the "curriculum or graduation requirements of the institutions" receiving federal aid. 122 Cong. Rec. 28136 (1976). Senator Bayh made the following remarks in opposition to the amendment:

> The impact of this amendment is enormous—it would exempt those areas of traditional discrimination against women that [were] the reason for the congressional enactment of Title IX. These areas would include scholarship aid, *employment and employment benefits* and extracurriculum activities such as athletics.

Id. at 28144 (emphasis added). Senator McClure's amendment was not adopted. *Id.* at 28147.

While Congress *later* amended the statute requiring congressional review of such regulations to provide that the failure to adopt a concurrent resolution disapprov-

ing a final regulation should not be construed as approval of the regulation or as a finding of consistency with the authorizing statute, 20 U.S.C. § 1232(d)(1), we think the failure of Congress here to adopt resolutions, *along with bills and amendments*, specifically designed to exempt employment from HEW regulation after hearing arguments on both sides provides some evidence that coverage was intended. *See Cannon v. University of Chicago, supra*, 441 U.S. at 703; *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14-16 (1941). Moreover, Congress has twice amended the coverage of Title IX when it has disagreed with HEW's interpretation of the statute. 20 U.S.C. § 1681(a)(8), (9). *See NLRB v. Bell Aerospace Co., supra*, 416 U.S. at 275; *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 313-14 (1933). We recognize that this review of subsequent congressional action with respect to the regulations is not conclusive, and we agree with the First Circuit that "Congressional inaction should not be lightly construed as approval," *Islesboro School Committee v. Califano, supra*, 593 F.2d at 428 n.3. Nonetheless, we think the congressional reaction to the Title IX regulations, in the context of the legislative history as a whole, lends some additional weight to the view that § 901 was expressly intended to relate to employment practices.

Nor is it particularly noteworthy that employment discrimination in educational institutions is now prohibited by Title VII and the Equal Pay Act. Overlapping jurisdiction in the area of employment discrimination is well recognized. *See Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 48-49 (1974). We visualize Congress as in effect saying

that individual employees may exercise their rights under either Title VII or the Equal Pay Act, but that HEW may use its powers to threaten to withdraw federal funds or actually withdraw them if necessary when a recipient of federal financial assistance practices discrimination on the basis of sex.[12]

We recognize the argument that purports to speak both to the heart and to "common sense."—*i.e.*, that Congress could hardly have intended to penalize the students who are primary beneficiaries of a federally funded program simply because there is discrimination against teachers or staff. While this argument may have some initial appeal, we believe it to be superficial. HEW unquestionably has the authority to withhold funds when it finds that any *student* or group of *students* has been discriminated against in any educational program even when the vast majority of students in such a program have suffered no discrimination and would be hurt by the loss of funds. It is perfectly consistent, in our view, to find that Congress has given HEW the same authority to oversee sex discrimination in educational *employment* in light of the grave congressional concern over sex discrimination in that area. *See* note 10 *supra*. As we have indicated, our reading of the statutory scheme leads us to conclude that Congress intended HEW to have available the potent remedy of fund withdrawal to ensure compliance with the prohibition against sex discrimina-

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12 We note that HEW included in Subpart E an exemption, similar to that contained in § 703(e) of Title VII, 42 U.S.C. § 2000e-2(e), for those situations where sex discrimination can be justified as a "bona fide occupational qualification" (BFOQ). 45 C.F.R. § 86.61 (now 34 C.F.R. § 106.61 (May 9, 1980)). This eliminated the possible inconsistency that HEW could withdraw funds under Title IX for sex discrimination that is expressly authorized under the BFOQ exception of Title VII.

tion in employment rather than rely solely on the important, but usually piecemeal, sanctions available to aggrieved employees under Title VII and the Equal Pay Act.

Finally, while § 902 of Title IX requires that an order terminating federal financial assistance be "limited in its effect to the particular program or part thereof, in which . . . noncompliance has been . . . found," we disagree with the court below and the district court in *Romeo Community Schools, supra*, 438 F. Supp. at 1033, that this limitation "is implicitly a limitation on HEW's authority to regulate as well." Such a construction is contrary to the judicial approval given to broad HEW guidelines under Title VI of the Civil Rights Act of 1964, which also contains this language limiting fund termination. *See United States v. Jefferson County Board of Education*, 372 F.2d 836, 847-61 (5th Cir. 1966), *adopted en banc per curiam*, 380 F.2d 385, *cert. denied*, 389 U.S. 840 (1967). Moreover, employment discrimination is no less "program specific" than other practices recognized as subject to the provisions of Title VI and Title IX. For instance, discrimination in admissions to an institution's graduate schools is clearly prohibited by Title IX regardless of whether the discrimination occurs solely in one graduate program or all graduate programs. By the same token, employment discrimination might occur in one program or in more than one program. Nothing in § 902 requires HEW only to issue regulations directed at specific programs. Rather, we think the statute merely requires that any termination of funds be limited to the particular program or programs in which noncompliance with § 901 is found and does not require HEW to specify prior to termination which particular programs receiving financial assistance are covered by its regulations.

In order to terminate federal assistance to a particular program under Title IX, HEW is required to show that there has been sex discrimination in that program. And if discrimination occurs throughout an entire educational system, that system can be considered one "program" under Title IX or Title VI for purposes of terminating funds. *See Jefferson County, supra*. But the question of the scope of HEW's authority to terminate funds is different from the question whether HEW is authorized by § 901 of Title IX to issue broad regulations prohibiting sex discrimination in employment. The latter question we answer in the affirmative, and hence do not reach the question whether HEW has authority to issue regulations which prohibit sex discrimination in employment to the extent that it constitutes discrimination against students—the so-called question of "infection." [13]

Because of its holding that HEW had no authority to issue employment regulations under Title IX, the district court did not take any evidence on the questions whether North Haven or Trumbull engaged in any discrimination on the basis of sex or whether, if so, any fund termination had to be limited to a particular program or particular programs. In reversing the summary judgments granted by the district court in favor of the school boards, we express no view as to whether the HEW regulations were actually violated or what remedies, if any, might be appropriate. We merely hold that HEW has authority under Title IX to promulgate the employment discrimination regulations at issue here.

We accordingly reverse the judgment below and remand the cause for further proceedings.

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13 *See* note 6 *supra* and accompanying text.

APPENDIX D

United States Court of Appeals
FOR THE NINTH CIRCUIT

No. 78-1746
DC CV 77-631-S

SEATTLE UNIVERSITY, A WASHINGTON NONPROFIT CORPORATION, PLAINTIFF-APPELLEE,

v.

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, AN AGENCY OF THE UNITED STATES OF AMERICA, DEFENDANT/APPELLANT.

APPEAL from the United States District Court for the Western District of Washington (Seattle)

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered June 19, 1980.

Supreme Court, U.S.
FILED
OCT 29 1980
MICHAEL RODAK, JR., CLERK

NO. 80- 493

IN THE

Supreme Court of the United States

OCTOBER TERM 1980

UNITED STATES DEPARTMENT OF EDUCATION,
Petitioner,

v.

SEATTLE UNIVERSITY,
Respondent.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1980

UNITED STATES DEPARTMENT OF EDUCATION,
Petitioner,

v.

SEATTLE UNIVERSITY,
Respondent.

RESPONSE TO PETITION FOR
WRIT OF CERTIORARI

Seattle University responds to the petition of the United States Department of Education to review by writ of certiorari the judgment of the United States Court of Appeals for the Ninth Circuit.

ARGUMENT

Review on writ of certiorari should be granted only where there are special and

important reasons therefor. Rule 19, Supreme Court Rules. Respondent respectfully submits that no such special and important reasons exist under the facts of this case to justify granting the requested writ.

I.

THE SECOND CIRCUIT'S DECISION IN NORTH HAVEN IS NOT FINAL

In 1979 this Court denied petitioner's request for a writ of certiorari in other cases similar to this one. Romeo Community Schools v. HEW, 600 F.2d 581 (6th Cir.), cert. denied, 444 U.S. 972 (1979); Islesboro School Committee v. Califano, 593 F.2d 424 (1st Cir.), cert. denied, 444 U.S. 972 (1979); Junior College District of St. Louis v. Califano, 597 F.2d 119 (8th Cir.), cert. denied, 444 U.S. 972 (1979). Petitioner reapplies citing conflict among the courts of appeal as the result of the

decision of the Second Circuit in North Haven Board of Education v. Hufstedler, Nos. 79-6136, 79-6247, and 79-7747 (2d Cir. July 24, 1980).

A petition for rehearing and request for hearing en banc has been filed in the North Haven case and is pending at the time of the preparation of this response. The Second Circuit may change its decision and agree with the other courts that have found the regulations in question invalid. If that were to occur, the basis for this petition would no longer exist.

The decision of the Second Circuit in North Haven is not final for the reason that a timely petition for rehearing is pending before that court. United States v. Healey, 376 U.S. 75 (1964). See United States v. Ellicott, 223 U.S. 524 (1911). This Court has ordinarily not issued a writ of certiorari based on

conflict between the courts of appeal until a final decree has been entered. American Construction Co. v. Jacksonville, Tampa & Key West R.R., 148 U.S. 372 (1892).

II.

NO CONTROVERSY EXISTS BETWEEN PARTIES

A complaint alleging sex-based discrimination under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681, was filed with the Department of Health, Education and Welfare[1] ("HEW") on April 21, 1975 by certain faculty members of the University's School of Nursing. It was pursuant to this charge that HEW conducted the investigation which the University later sought to enjoin.

Shortly after the district court's decision granting the University's Motion

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[1] Now called the Department of Education.

for Summary Judgment and invalidating as to the facts of this case HEW's Title IX employment regulations, HEW notified Seattle University that it would continue its investigation of the underlying discrimination complaint under Executive Order 11246, as amended. Title IX of the Education Amendments of 1972 and Executive Order 11246, as amended, prohibit sex discrimination by educational institutions and federal contractors, respectively. Seattle University is both an educational institution and a federal contractor.

On March 23, 1979 HEW referred the complaint to the U.S. Department of Labor, Office of Federal Contract Compliance Programs ("OFCCP") for investigation.[2]

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[2] This was a result of reorganization within federal agencies involving inter alia investigation of charges of unlawful discrimination under Executive Order 11246, as amended. This reorganization was done pursuant to Executive Order 12086, effective October 8, 1978 (43 F.R. 46501).

On August 17, 1979 OFCCP began an investigation of the allegations of sex discrimination set forth in the April 21, 1975 complaint.

OFCCP completed its investigation approximately eleven months later and on July 11, 1980, issued a "Notification of Results of Investigation." OFCCP found that there was insufficient evidence to conclude that Seattle University had violated its obligations under the nondiscrimination and affirmative action provisions of Executive Order 11246, as amended.

The complaint underlying HEW's investigation has been investigated by the federal government and found to be without merit.

Seattle University submits that these subsequent events render the case moot. There is no longer an actual controversy between the parties to this action.

This Court has held that the determination of whether a controversy exists is determined at the time the court considers a case, not as of the time it was filed. Roe v. Wade, 410 U.S. 113 (1973).

There being no actual controversy between the University and HEW at this time, the Court should deny the Government's request for writ of certiorari. U.S. Const. art. III, § 2; DeFunis v. Odegaard, 416 U.S. 312 (1974); Flast v. Cohen, 392 U.S. 83 (1968).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

ROBERT J. WALERIUS, and
DOUGLAS M. DUNCAN,
MORIARTY, MIKKELBORG, BROZ,
WELLS & FRYER
Attorneys for Respondent.

OCTOBER 1980

Supreme Court, U. S.
FILED
NOV 20 1980
MICHAEL RODAK, JR., CLERK

No. 80-493

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES DEPARTMENT OF EDUCATION,
PETITIONER

v.

SEATTLE UNIVERSITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In the Supreme Court of the United States

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UNITED STATES DEPARTMENT OF EDUCATION,
PETITIONER

v.

SEATTLE UNIVERSITY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR PETITIONER

---

1. On October 24, 1980, the United States Court of Appeals for the Second Circuit denied the petition for rehearing in *North Haven Board of Education* v. *Hufstedler*, Nos. 79-6136, 79-6247, 79-7747 (July 24, 1980). Accordingly, the conflict in the circuits on the question presented by our petition is no longer uncertain.

2. Respondent contends (Resp. Br. 4-7) that this case has been rendered moot by the Office of Federal Contract Compliance Programs' issuance, on July 11,

1980, of a "Notification of Results of Investigation" stating that there was insufficient evidence to conclude that Seattle University had violated its obligations under the nondiscrimination and affirmative action provisions of Exec. Order No. 11246, 30 Fed. Reg. 12319 (1965), as amended. There is no merit to this contention.

Even assuming for the sake of argument that the Department of Education ("the Department") is bound by the results of the OFCCP investigation into sex discrimination by Seattle University with respect to faculty salaries in the School of Nursing,[1] a live case or controversy remains.

In order to assure that educational institutions receiving federal aid abide by the nondiscrimination

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[1] The negative findings in the "Notification" issued by the OFCCP of the Department of Labor are predicated on the apparent assumptions (1) that discrimination on the basis of sex with respect to the salaries of the instructors in respondent's School of Nursing can be shown only if there are sex-based discrepancies in salaries paid the instructors *within* that school and (2) that the absence of male faculty members in that school thus precludes any comparison of salaries for the purpose of determining if respondent is discriminating on the basis of sex (App. B, *infra*, 4a-5a). But as the court of appeals in *Gunther* v. *County of Washington*, 602 F.2d 882 (9th Cir. 1979), cert. granted, No. 80-429 (Nov. 3, 1980), has held, the sex discrimination provision of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a)(1), prohibits discrimination on the basis of sex among employees holding "comparable," although not "substantially equal," jobs. 602 F.2d at 888-891. The Department believes this correctly states the standard under Title IX, so that a failure to determine whether faculty positions elsewhere in the University are comparable to those in the School of Nursing necessarily renders the investigation inadequate for purposes of Title IX.

requirements of Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, the Department has provided by regulation for the conduct of periodic compliance reviews (34 C.F.R. 100.7(a)) and for investigations where such reviews indicate "a possible failure to comply" with its nondiscrimination regulations issued under Title IX (34 C.F.R. 100.7(c)).[2] Under the judgment entered in this case (App. A, *infra*, 2a), the Department's employment discrimination regulations (34 C.F.R. 106.51-106.61) are declared invalid[3] and the Department is enjoined not only from pursuing the complaint that triggered the investigation giving rise to this litigation, but also from

> engaging in *any* investigation of Seattle University pursuant to any complaint filed with the defendant alleging discrimination against any employee of the University under Title IX, § 901 *et seq.*, the Education Amendments of 1972, 20 U.S.C. § 1681 et *seq.*, and regulations adopted by defendant pursuant thereto, 45 C.F.R. Subpart E, §§ 86.51-61; from *making or attempting to make any finding that Seattle University*

[2] The Department of Education's regulations (34 C.F.R.) are published at 45 Fed. Reg. 30802 (1980).

[3] These are the counterparts of 45 C.F.R. 86.51-86.61, the Title IX employment practices regulations issued by the Department of Health, Education, and Welfare (HEW), which were in effect when this litigation began. Pursuant to Section 505(d) and (e) of the Department of Education Organization Act, Pub. L. No. 96-88, 93 Stat. 691 (to be codified at 20 U.S.C. 3505), the Department of Education was automatically substituted for HEW in this suit. The judgment invalidating the HEW regulations and enjoining their enforcement accordingly applies to the Department of Education and its counterpart regulations.

> *is in noncompliance with said regulations;* from terminating or refusing to grant or attempting to terminate or refuse to grant federal financial assistance to Seattle University for any alleged noncompliance with said regulations; and from failing to duly and normally process Seattle University's applications for federal financial assistance * * *. [Emphasis added.]

The Department is therefore effectively barred from conducting compliance reviews to assure that respondent, as a federal aid recipient subject to Title IX, is complying with all of the regulations promulgated to enforce that statute. Whether or not the particular complaint that spawned this litigation remains at issue, a controversy exists between the parties as to the Department's authority to conduct its continuing review function with respect to sex discrimination in employment. If the regulations now promulgated at 34 C.F.R. 106.51-106.61 are valid, as the Department contends, then its compliance reviews may include reviews of respondent's employment practices; if those regulations are invalid, then the compliance reviews must be limited accordingly. The parties thus possess "a legally cognizable interest in the outcome" of this case, and it accordingly is not moot. *Powell* v. *McCormack*, 395 U.S. 486, 496 (1969). See also *Andrus* v. *Idaho*, 445 U.S. 715, 722-725 (1980).

For these reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

NOVEMBER 1980

APPENDIX A

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. C77-631S

SEATTLE UNIVERSITY, a Washington nonprofit corporation, PLAINTIFF

vs.

UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, an agency of the United States of America, DEFENDANT

DECLARATORY JUDGMENT AND ORDER FOR PERMANENT INJUNCTION

This matter having come on regularly for hearing before the Honorable Morell E. Sharp, United States District Judge, on cross motions for summary judgment, and the Court having reviewed the pleadings and affidavits on file, reviewed the memoranda and briefs submitted by counsel for both parties, heard argument of counsel, and having entered its Findings of Fact and Conclusions of Law; NOW, THEREFORE, it is hereby

ORDERED, ADJUDGED AND DECREED, that the employment regulations, 45 C.F.R. Subpart E, §§ 86.51-.61, promulgated by defendant pursuant to

the Education Amendments of 1972, Title IX, § 901, *et seq.*, 20 U.S.C. § 1681, *et seq.*, and all actions and proceedings taken by defendant pursuant thereto with respect to Seattle University are invalid and void and of no effect whatsoever; and it is

FURTHER ORDERED, ADJUDGED AND DECREED, that the preliminary injunction previously granted in this cause is hereby made permanent, and, accordingly, the United States Department of Health, Education and Welfare, its Secretary Joseph Califano, its other agents and employees, and those persons in active concert or participation with them, are permanently enjoined from engaging in any investigation of Seattle University pursuant to any complaint filed with the defendant alleging discrimination against any employee of the University under Title IX, § 901 *et seq.*, the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*, and regulations adopted by defendant pursuant thereto, 45 C.F.R. Subpart E, §§ 86.51-.61; from making or attempting to make any finding that Seattle University is in noncompliance with said regulations; from terminating or refusing to grant or attempting to terminate or refuse to grant federal financial assistance to Seattle University for any alleged noncompliance with said regulations; and from failing to duly and normally process Seattle University's applications for federal financial assistance; and it is

FURTHER ORDERED, ADJUDGED AND DECREED, that the bond posted by the University is exonerated; and it is

FURTHER ORDERED, ADJUDGED AND DECREED, that defendant may retain documents and materials produced by plaintiff pending final deter-

mination of the case after appeal or until further order of the Court; provided, that the United States Department of Health, Education and Welfare shall, during the appeal period, segregate plaintiff's materials from other files, and access to these materials and information contained therein shall not be accorded to any other agency or person.

The Clerk of this Court is instructed to send uncertified copies of this Order to all counsel of record.

DATED at Seattle, Washington, this 20th day of January, 1978.

/s/ Morell E. Sharp
United States District Judge

APPENDIX B

JEAN BUSHMAN, ET AL.
22229 - 98th West
Edmonds, Washington 98020
COMPLAINANT

vs.

SEATTLE UNIVERSITY
Broadway and East Madison
Seattle, Washington 98122
CONTRACTOR

NOTIFICATION OF RESULTS OF INVESTIGATION

On August 17, 1979, the Office of Federal Contract Compliance Programs, U. S. Department of Labor began an investigation of the allegation of sex discrimination made in the complaint of Jean Bushman, et al., filed on April 21, 1975. Our investigation has resulted in the following findings:

1. Seattle University is a government contractor and is not exempt from Executive Order 11246, as amended.

2. The complainant alleges the contractor violated its obligations under the nondiscrimination and affirmative action provisions of its Federal contract by discriminating against female instructors who have Masters Degrees in the School of Nursing, by paying them lower salaries than male instructors (who have Masters Degrees) in other schools.

3. Our investigation revealed that since there are no males in the School of Nursing there is no way

to compare salaries of males and females in that school. Based on the findings of this investigation, there was insufficient evidence to conclude that the contractor has violated its obligations under the non-discrimination and affirmative action provisions of Executive Order 11246, as amended. Therefore, the Department's processing of this complaint is hereby concluded.

As set forth in 41 CFR 60-1.24(c)(5), the Director of the Office of Federal Contract Compliance Programs may, for reasonable cause, reconsider or order the reconsideration of this determination. If you desire reconsideration you should address a written request to Director, OFCCP, U. S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Such a request should be accompanied by affidavits, signed testimony of supervisory or fellow workers, or other written documentation that would substantially alter our findings in this case.

On behalf of the United States Department of Labor

July 11, 1980
Date

/s/ Sandra H. Robinson

SANDRA H. ROBINSON
Assistant Regional Administrator
Office of Federal Contract
Compliance Programs
Region X

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MOTION FILED
JAN 22 1981

No. 80-493

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES DEPARTMENT OF EDUCATION,
Petitioner,

v.

SEATTLE UNIVERSITY,
Respondent.

On Appeal from the Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER OF AMERICAN CIVIL LIBERTIES UNION WOMEN'S RIGHTS PROJECT, CENTER FOR NATIONAL POLICY REVIEW, DISPLACED HOMEMAKERS NETWORK, INC., FEDERATION OF ORGANIZATIONS FOR PROFESSIONAL WOMEN, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, NATIONAL ASSOCIATION OF COMMISSIONS FOR WOMEN, NATIONAL EDUCATION ASSOCIATION, NOW LEGAL DEFENSE

[Additional Amici Curiae listed on inside cover]

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

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UNITED STATES DEPARTMENT OF EDUCATION,
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v.

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Respondent.

On Appeal from the Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

American Civil Liberties Union Women's Rights Project, Center for National Policy Review, Displaced Homemakers Network, Inc., Federation of Organizations for Professional Women, League of Women Voters of the United States, Mexican American Legal Defense and Education Fund, National Association of Commissions for Women, National Education Association, NOW Legal Defense and Education Fund, National Student Education Fund, National Women's Political Caucus, Organization of Chinese American Women, Rural American Women, Southern Coalition for Educational Equity, Women Employed, Women's Equity Action League, Women's Equity Action League Educational and Legal Defense Fund, Women's Legal Defense Fund, Wider

Opportunities for Women, Inc., and United States Student Association respectfully move, pursuant to Rule 42 of this Court's Rules, to file the within brief *amici curiae* in *United States Department of Education* v. *Seattle University* in support of the petitioner United States Department of Education. Counsel for petitioner, U.S. Department of Education, has consented to the filing of this brief. The respondent, Seattle University, has instructed its attorneys to file a motion to withdraw as counsel and to take no further action in this case. Counsel for Seattle University has informed us that in light of this motion, counsel for the respondent neither consents nor fails to consent to the filing of this brief.

These organizations share a concern that individuals be free to participate in all facets of American life without discrimination on the basis of gender. Central to the effort to secure equal rights for women is the establishment of an educational system which is itself free from gender-based bias. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* ("Title IX") is one of the most important tools available to combat sex discrimination in educational institutions. To exclude employment discrimination from its scope would be to eliminate a critical means for securing sex equity in schools, adversely affecting both employees and students alike.

Because of these organizations' long-standing work towards the elimination of gender discrimination, they believe their brief will be of substantial assistance to the Court in the resolution of the issues raised by this case. In particular, their brief will not restate the analysis of the statute, legislative history and case law to be presented by the petitioner, but rather will focus upon the special concerns of Congress in addressing gender-based employment discrimination in schools in 1972 in contrast to its perception of the problem in earlier years, the importance of Title IX coverage of employment discrimina-

tion, and the broad array of federal funds which benefit employees of educational institutions.

Respectfully submitted,

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January 22, 1981

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On Appeal from the Court of Appeals for the Ninth Circuit

BRIEF *AMICI CURIAE* IN SUPPORT OF PETITIONER

OF AMERICAN CIVIL LIBERTIES UNION WOMEN'S RIGHTS PROJECT, CENTER FOR NATIONAL POLICY REVIEW, DISPLACED HOMEMAKERS NETWORK, INC., FEDERATION OF ORGANIZATIONS FOR PROFESSIONAL WOMEN, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, NATIONAL ASSOCIATION OF COMMISSIONS FOR WOMEN, NATIONAL EDUCATION ASSOCIATION, NOW LEGAL DEFENSE AND EDUCATION FUND, NATIONAL STUDENT EDUCATION FUND, NATIONAL WOMEN'S POLITICAL CAUCUS, ORGANIZATION OF CHINESE AMERICAN WOMEN, RURAL AMERICAN WOMEN, SOUTHERN COALITION FOR EDUCATIONAL EQUITY, WOMEN EMPLOYED, WOMEN'S EQUITY ACTION LEAGUE, WOMEN'S EQUITY ACTION LEAGUE EDUCATIONAL AND LEGAL DEFENSE FUND, WOMEN'S LEGAL DEFENSE FUND, WIDER OPPORTUNITIES FOR WOMEN, INC., AND UNITED STATES STUDENT ASSOCIATION

INTEREST OF *AMICI*

The interest of *amici* appears from the foregoing motion.

SUMMARY OF ARGUMENT

The instant case presents the issue of whether Title IX prohibits sex discrimination in the employment policies and practices of educational institutions receiving federal financal assistance. The United States Court of Appeals for the Ninth Circuit below held that employment discrimination *per se* is not prohibited by Title IX. *United States Department of Education* v. *Seattle University*, 621 F.2d 992 (9th Cir. 1980).[1] Some other circuit courts have agreed. *Romeo Community Schools* v. *HEW*, 600 F.2d 581 (6th Cir. 1978), *cert. denied*, 444 U.S. 972 (1979); *Isleboro School Committee* v. *Califano*, 593 F.2d 424 (1st Cir. 1979), *cert. denied*, 100 S.Ct. 467 (1979) and *Junior College District of St. Louis* v. *Califano*, 597 F.2d 119 (8th Cir. 1979), *cert. denied*, 100 S.Ct. 467 (1979). However, *North Haven Board of Education* v. *Hufstedler*, 629 F.2d 773 (2d Cir. 1980), *petition for cert. docketed*, 49 U.S.L.W. 3467 (Jan. 6, 1981), and *Dougherty County School System* v. *Harris*, 622 F.2d 735 (5th Cir. 1980), *petition for cert. docketed*, 49 U.S.L.W. 3495 (Jan. 13, 1981) hold that employment practices of federal aid recipients can be covered.

In this brief, *amici* will not restate the analysis of the statute, legislative history and case law presented by the petitioner United States Department of Education. Rather, *amici* will focus upon the particular concern Congress had with regard to gender-based employment dis-

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[1] The Court did not find, however, that employment discrimination could not be reached to the extent that a showing of adverse impact on students is shown, or to the extent that the employment discrimination takes place in a program receiving federal funds whose primary purpose is to support employment.

crimination by schools when enacting Title IX as contrasted to the approach to employment discrimination taken by the Congress in 1964 when it enacted Title VI.[2] Its better understanding of the problems of employment discrimination in general, as well as the particularly serious adverse consequences of sex discrimination in employment by schools, led the Congress in 1972 to adopt a broader approach to remedy the problems of employment discrimination than it had taken in 1964. Hence, as *amici* discuss below, even though Congress expressly modeled Title IX after Title VI, it intended to enact a broader Title IX prohibition against employment discrimination in schools, and purposely omitted the Title VI employment exclusion in order to secure that additional protection.

Moreover, by including coverage of employment practices and policies in Title IX, Congress added an important remedy to combat problems of sex discrimination in schools—a remedy which included the enforcement capabilities of the Office for Civil Rights, then in the Department of Health, Education and Welfare[3] as well as the remedy of federal fund termination which is not available under Title VII. Given the broad-based federal financial assistance benefiting both students and employees, this additional Title IX remedy is particularly appropriate and important.

---

[2] Title VI of the Civil Rights Act of 1964, § 601, 42 U.S.C. § 2000d *et seq.* (1970) ("Title VI").

[3] Chief responsibility for Title IX enforcement is now lodged in the Department of Education. Moreover, other federal agencies which provide educational funding have Title IX enforcement responsibilities including the Department of Defense and the Department of Agriculture.

ARGUMENT

I. IN 1972 CONGRESS EXPANDED THE PROHIBITIONS AGAINST SEX DISCRIMINATION IN EMPLOYMENT BY EDUCATIONAL INSTITUTIONS

With the Civil Rights Act of 1964,[4] Congress passed sweeping legislation addressing the problems of discrimination in this country. Included in the legislation was Title VI, prohibiting discrimination on the basis of race or national origin in programs or activities receiving federal financial assistance, and Title VII,[5] prohibiting employment discrimination on the basis of race, sex, national origin or religion.

As beginning efforts, these laws had limitations in their scope and coverage. Title VII, for example, did not apply to educational activities of educational institutions or to public employees.[6] As a result, teachers and school administrators at all levels were denied Title VII protection against employment discrimination on the basis of race, sex, national origin or religion. Consistent with this limitation, Congress excluded employment discrimination from coverage under Title VI.[7] These legislative exemptions reflected a cautious approach as Congress entered a new sphere of regulation.

By 1972, Congress had gained substantial experience and additional information concerning the nature of employment discrimination in general and in schools in particular. Moreover, it had the opportunity to review the operation of Title VI and Title VII, and to reach conclusions about their limitations as originally drafted.

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[4] Pub. L. No. 88-352, 42 U.S.C. §§ 2000a-2000g (1970).

[5] 78 Stat. 253, 42 U.S.C. § 2000e *et seq.* (1970).

[6] 42 U.S.C. § 2000e-1 (1970).

[7] 42 U.S.C. § 2000d-3 (1970).

As a result of this review, Congress addressed the problems of sex discrimination in educational institutions in a sweeping manner, both as it affected students and employees. Congress amended Title VII to remove the exclusion of coverage for educational activities of educational institutions;[8] amended the Equal Pay Act of 1963[9] to remove the exemption of professional employees including teachers;[10] and passed Title IX which on its face broadly prohibits sex discrimination of any type[11] in educational institutions receiving federal funds.

The concern with employment discrimination in schools was a theme repeatedly expressed by the Congress. As Senator Williams[12] stated during the Congressional debate on the Equal Employment Opportunity Act of 1972:

> "The existence of discrimination in the employment practices of our Nation's educational institutions is well known, and has been adequately demonstrated by overwhelming statistical evidence as well as numerous complaints from groups and individuals. Minorities and women continue to be subject to blatant discrimination in these institutions.

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[8] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 3, 86 Stat. 103, 42 U.S.C. § 2000e-1 (1970) (Supp. V 1975). In this Act, Congress also removed an exemption for public employers affecting public schools as employers among others. Pub. L. No. 92-261, § 2(1), 86 Stat. 103, 42 U.S.C. § 2000e(a) (1970) (Supp. V 1975).

[9] 29 U.S.C. § 206(d) (1970).

[10] Education Amendments of 1972, Pub. L. No. 92-318, Title IX, § 906(b)(1), 86 Stat. 375, amending § 13(a) of the Fair Labor Standards Act of 1938, 29 U.S.C. § 213(a), so that the Equal Pay Act would apply to teachers and administrative personnel in schools.

[11] The statute contains limited exceptions, but none exempt employment from coverage in contrast to the employment exemption in Title VI.

[12] Senator Williams sponsored the amendment and was floor manager of the debate.

As regards minorities, statistical studies show that minorities are generally underrepresented in teaching positions in educational institutions, and those that are employed are relegated to the lower paying and less prestigious positions. . . .

Perhaps the most extensive discrimination in educational institutions, however, is found in the treatment of women. While women are generally well represented statistically in terms of numbers employed, they are generally relegated to the lowest paying and least prestigious jobs. Women account for the majority of teachers in elementary and secondary schools but they are virtually totally excluded from positions as principals and other administrative or decisionmaking positions.

In institutions of higher education women are almost totally absent in the position of academic dean, and are grossly underrepresented in all other major faculty positions. Also, I would add, that the discrimination does not only exist as regards to the acquiring of jobs, but that it is similarly prevalent in the area of salaries and promotions where studies have shown a well-established pattern of unlawful wage differentials and discriminatory promotion policies." (emphasis supplied).

118 CONG. REC. 1992 (1972) (Remarks of Sen. Williams).

Similarly, the Report of the House Committee on Education and Labor, in explaining its version of the Title VII Amendments, stated:

"The committee feels that discrimination in educational institutions is especially critical. The committee cannot imagine a more sensitive area than educational institutions where the Nation's youth are exposed to a multitude of ideas that will strongly influence their future development. *To permit discrimination here would, more than in any other area, tend to promote misconceptions leading to future patterns of discrimination.*" (emphasis supplied).

H.R. REP. No. 353, 92d Cong., 1st Sess. 20 (1971). The Senate Report made similar conclusions. S. REP. No. 92-415, 92d Cong., 1st Sess. 11-12 (1971).

Congress' greater understanding of the problems of employment discrimination as it exists in educational institutions had as a basis the testimony presented in hearings preceding the enactment of Title IX and the Equal Employment Opportunity Act of 1972. The underrepresentation of women in American college and university faculties was well-documented in the hearings. Women were least often found in the sciences and engineering faculties and, when they were present in the faculty, women were clustered in the lower ranks and in positions outside the promotional ladders leading to academic tenure.[13] Women rarely held the administrative positions of academic dean, provost, president, chancellor or the lesser positions leading to these posts.[14]

Further, the particular and special importance of employment discriminaiton in schools was underscored. When Title IX was under consideration by the Congress in 1971, Dr. Pauli Murray reported that:

> "A more far-reaching result for which colleges and universities are directly responsible is the continued

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[13] *See, e.g., Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. (Part 1) 301 (1970) (Prepared Statement of Dr. Bernice Sandler) [hereinafter cited as 1970 House Hearings (Part 1)], and *id.* at 338 (Prepared Statement of Dr. Pauli Murray), and *id.* at 453 (Testimony of Virginia R. Allen) and *id.* at 591 (Prepared Statement of Women's Rights Committee of New York University School of Law); Loeb, Report on the University of Illinois Urbana-Champaign, Ill. in *Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. (Part 2) 1225 (1970) [hereinafter cited as 1970 House Hearings (Part 2)].

[14] *See, e.g.*, Sandler, Sex Discrimination at the University of Maryland, in 1970 House Hearings (Part 2), *supra* note 13, at 1024-1029; 1970 House Hearings (Part 1), *supra* note 13, at 301 (Prepared Statement of Dr. Bernice Sandler).

lack of 'role models' to encourage younger women to raise their goals and expectations and the perpetuation of the stereo-type that women are not a good academic investment. As the report on women at Columbia University pointed out:

> We are puzzled by the Graduate Faculties' commitment to train women, but not to hire them. We know from experience as students and teachers that it is vital for women students in graduate school to see women engaged in the academic profession as naturally as men are . . . . By the obvious scarcity of women training graduate students, the institution acclimatizes women students to their professional expectations: low rank, low pay, low status, a slower rate of promotion than their male colleagues, and a more difficult tenure hurdle.

Similarly, the report on women at Harvard University noted that the scarcity of women scholars in the senior ranks at Harvard tends to discourage the professional aspirations of women students and junior faculty. Thus, the self-fulfilling prophecy continues to operate. 'Since women have a visibly lower chance of success than men,' said Dr. Scott, 'fewer women are inspired to try, lowering in turn the numbers of women available' for academic positions." [footnotes omitted]

Murray, P., *Economic and Educational Inequality Based on Sex; An Overview*, 5 VAL. U. L. REV. 237 (1971) at 269-70. At the 1970 Congressional Hearings on Discrimination Against Women, the serious and varied negative ramifications for female students of discrimination against faculty women were highlighted in the submissions and statements of several individuals who were university faculty or administrators or social scientists.[15]

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[15] *See, e.g.*, Scott, *The Half-Eaten Apple: A Look at Sex Discrimination in the Univ.*, REPORTER, May 14, 1970, *reprinted in* 1970 House Hearings (Part 1) *supra*, note 13, at 147; 1970 House

Later studies have served to reinforce these earlier findings, and the conclusions Congress reached in 1972. It is well accepted that the availability of and access to role models has an influence on career choice by individuals. C. Safilios-Rothschild, *Sex Role Socialization and Sex Discrimination: A Synthesis and Critique of the Literature*, N.I.E., U.S. Department of HEW, Washington, D.C. (1979) at 79-80. Several national and state bodies have recognized the need for female role models for women students. *See, e.g.*, Carnegie Commission on Higher Education, *Opportunities for Women in Higher Education*, McGraw-Hill, Hightstown, N.J. (1973) at 68; National Advisory Council on Women's Educational Programs, *Equity for the Eighties: Fifth Annual Report*, U.S. Government Printing Office (1980) at 18 and *Toward Educational Equity: A Report of Findings From Outreach Activities During 1976*, U.S. Government Printing Office (1976) at 4; Council on the Economic Status of Women, *Minnesota Women in Education*, St. Paul, Minn. (1979) at 15; Pennsylvania Commission for Women, *Vocational Education and Apprenticeship Training of Women in Pennsylvania* (1978) at ii.

In 1973, the Carnegie Commission on Higher Education noted that undergraduate women could be discouraged from enrolling in traditionally male fields because the absence of women faculty there conveyed the impression that women could not succeed in the field. It also recognized the low level of support offered by male faculty in prestigious research-oriented institutions to females seeking training in their fields. *Opportunities for Women in Higher Education, supra* at 68. The Carnegie Commis-

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Hearings (Part 2) *supra*, note 13, at 1081 (letter to Chairman Green, dated July 12, 1970, with encl. from Sheila Tobias); *id.* at 1091-1093 (Prepared Statement of Helen B. Schleman); Rossi, Alice, *Status of Women in Graduate Departments of Sociology 1968-69*, 5 THE AM. SOCIOLOGIST (Feb. 1970), *reprinted in* 1970 House Hearings (Part 2) *supra*, 1242 at 1251-52.

sion endorsed changes in faculty employment practices that are premised on the special connection between employment practices and the level of educational opportunity offered to women students. *Id.* at 4.

In her study of women career achievers, Dr. M. Elizabeth Tidball found a high, statistically significant dependence between the presence of career-successful women on the faculty of colleges and universities and the rate with which those institutions produced women with high career achievement. Tidball, M.E., *Women's Colleges and Women Achievers Revisited*, 5 SIGNS: JOURNAL OF WOMEN IN CULTURE AND SOCIETY 504 (1980) at 508. *See also* Tidball, M.E., *Of Men and Research*, 47 JOURNAL OF HIGHER EDUCATION 373 (1976) at 386-387; and Tidball, M.E., *The Search for Talented Women*, 6 CHANGE 51-52, 64 (1974).

At the secondary and postsecondary levels, the dynamics of role models are much the same for women in vocational education programs as they are for those in an academic degree program. The majority of women students have historically been enrolled in only three of the major areas of vocational training offered by schools: office work, health services and home economics. The better-paying areas—technical, trade, and industrial courses and agriculture—are dominated by male instructors and male students. *Hearings on Sex Discrimination and Sex Stereotyping in Vocational Education Before the Subcomm. on Elementary, Secondary and Vocational Education of the House Comm. on Education and Labor*, 94th Cong., 1st Sess. (1975) 2-13 (testimony of Dr. Marilyn Steele) and *id.* at 102-114 (prepared statement of Pamela Ann Roby). The importance of moving women into teaching positions in these fields and into vocational education administration has been noted at Congressional hearings, *id.* at 109, and in the recommendations of several commissions and councils. *See, e.g., Minnesota Women &*

Education, supra at 11-16, 25-26. One of the major recommendations of the Pennsylvania Commission for Women's Task Force on Vocational Education and Apprenticeship Training was for an increase in the number of women in decision-making positions in vocational education, both to provide leadership vital to reducing sex-stereotyped programs and to serve as role models for the women and girls training in the area. *Vocational Education and Apprenticeship Training of Women in Pennsylvania, supra* at ii.[16]

In sum, the same Congress which enacted Title IX also declared its increased awareness of the problems of discrimination in employment, and the particularly serious problem of sex discrimination in employment by educational institutions. As the Senate Report on the Equal Employment Opportunity Act of 1972 explained, "it has been demonstrated that employment discrimination is even more pervasive and tenacious than Congress had assumed it to be at the time it passed the Act [Title VII]." S. REP. No. 92-415, 92d Cong., 1st Sess. 4 (1971). It is against this backdrop that the passage of Title IX, and the elimination of the Title VI exclusion of employment discrimination, must be read.

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[16] Of course, where the connection is shown between employment discrimination and discrimination against students, such discrimination can be addressed as discrimination against students even under Title VI where employment discrimination was specifically exempted from coverage. *See, e.g.*, United States v. Jefferson County Bd. of Educ., 372 F.2d 836 (5th Cir. 1966), *aff'd en banc*, 380 F.2d 385 (5th Cir. 1967), *cert. denied sub nom.* Caddo Parish School Bd. v. United States, 389 U.S. 840 (1967); United States v. El Camino Community College District, 600 F.2d 1258 (9th Cir. 1979), *cert. denied*, 100 S.Ct. 661 (1980).

II. THE FAILURE OF CONGRESS TO INCLUDE IN TITLE IX THE TITLE VI EXEMPTION OF EMPLOYMENT DISCRIMINATION REFLECTS ITS INTENTION TO PROHIBIT EMPLOYMENT DISCRIMINATION *PER SE* NOT ONLY IN TITLE VII BUT ALSO IN TITLE IX

The Court below, and others holding that employment discrimination *per se* is not covered under Title IX [17] have viewed the amendment of Title VII to include educational institutions as the exclusive remedy available to address problems of sex discrimination in employment by schools. These cases hold that even though Title VII was amended to include educational institutions, and even though Congress thereafter enacted Title IX without an employment discrimination exemption, a Title VI-like employment exemption must be read into the statute.

However, for Congress to prohibit employment discrimination in schools, as it did when it amended Title VII, yet retain an employment exemption when it then enacted Title IX, is contrary to Congress' consistent approach in dealing with problems of employment discrimination. Congress has repeatedly responded to the range and complexity of employment discrimination by enacting independent statutes vesting the courts and governmental agencies with overlapping power to enforce their legislative objectives. Rather than limiting coverage, Congress has consistently expanded employment discrimination prohibitions through numerous avenues.

It has been well established by the courts that Title VII is not the exclusive remedy for unlawful employment practices, and that there are varied sources of relief available. The Supreme Court has expressly recognized

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[17] *See* Romeo Community Schools v. U.S. Depart. of HEW, *supra;* Isleboro School Comm. v. Califano, *supra;* Junior College Dist. of St. Louis v. Califano, *supra.*

Congress' approach of overlapping remedies in *Alexander* v. *Gardner-Denver*, 415 U.S. 36, 47-49 (1974):

> [L]egislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination . . . . [T]he legislative history of Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes. The clear inference is that Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination.

See also Johnson v. *Railway Express Agency, Inc.*, 421 U.S. 454, 459 (1975); *International Union of Electrical, Radio & Machine Workers* v. *Robbins & Myers*, 429 U.S. 229 (1976); *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 996 (D.C. Cir. 1973); *Alpha Portland Cement Co.* v. *Reese*, 507 F.2d 607, 610 (5th Cir. 1975); *Piva* v. *Xerox*, 376 F.Supp. 242, 246 (N.D. Cal. 1974).

Further, the enactment of overlapping remedies is not unique to the area of employment discrimination. Congress has frequently permitted simultaneous use of different proceedings for relief. For example, in the antitrust area the Federal Trade Commission Act (FTCA) [18] was designed by Congress to supplement and bolster the Sherman Act [19] and the Clayton Act.[20]

In *F.T.C.* v. *Cement Institute Co.*, 333 U.S. 683 (1948), the Supreme Court explained that the Sherman Act and the FTCA were designed to provide the government with cumulative remedies against activities detrimental to fair competition. Congress proposed to enforce the Sherman Act through the Justice Department and to

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[18] 15 U.S.C. § 41 *et seq.* (1970).

[19] 15 U.S.C. §§ 1-7 (1970).

[20] 15 U.S.C. § 12 *et seq.* (1970).

supplement that enforcement through the administrative process of the FTC. The FTC was not envisioned as a rival, but as an aid to the Sherman Act. *F.T.C.* v. *Cement Institute Co., supra,* at 694-95. *See also, F.T.C.* v. *Motion Picture Advertising,* 344 U.S. 392, 394 (1953).

Similarly, the Federal Trade Commission and the Food and Drug Administration share overlapping jurisdiction in the prevention of deceptive drug labeling. The FTCA has provisions for the FTC to prevent unfair and deceptive labeling practices. The Food, Drug and Cosmetic Act [21] enables the Food and Drug Administration to review drug labeling and ensure the accuracy of the information. In *Warner Lambert Co.* v. *FTC,* 361 F. Supp. 948, 952-953 (D.D.C. 1973), the court held that concurrent proceedings by both agencies were proper and that the statutory remedies of the two are cumulative and not mutually exclusive.[22]

Moreover, given the particular focus of and remedies under Title IX, its coverage of employment discrimination is particularly important. The court in *Isleboro Sch. Comm.* v. *Califano, supra,* at 430, upon which both the Sixth Circuit in *Romeo* and the Eighth Circuit in *Junior College* rely, erroneously assumed that the issue of Title IX coverage was a question of "largely academic interest" because Title VII was amended to prohibit the particular employment practices complained of in that case. This assumption highlights the First Circuit's misperception of the importance of Title IX employment coverage, and may explain why the court did not understand

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[21] 21 U.S.C. § 301 *et seq.* (1970).

[22] *See also,* section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(1) (1976) (Supp. III 1979) and Section 8 of the National Labor Relations Act, 29 U.S.C. § 158 (1970), which provide overlapping remedies for the protection of miners' safety and health activities.

Congress' intention to include employment within the scope of Title IX. Similarly, the *Romeo* court views the Title VII remedies as "superior" to those of Title IX. *Romeo Community Schools* v. *U.S. Department of HEW*, *supra* at 584.

In fact, however, unlike the Equal Pay Act and Title VII, Title IX is directed toward the federal government's responsibility to assure that federal funds are not used to aid or abet unlawful sex discrimination. With employment discrimination covered under Title IX, employees receive the extra protection which accompanies a sanction not available under Title VII or the Equal Pay Act—that of federal fund termination if the employment discrimination is not stopped. Clearly the prospect of losing federal funding can provide at least as great an incentive to a school to eliminate its discriminatory employment policies and practices as the chance that an employee might seek individual remedies through a Title VII or Equal Pay Act case. *See North Haven Board of Education* v. *Hufstedler*, *supra* at 784-785.

Further, the coverage of employment discrimination under Title IX brings with it the benefits of a governmental enforcement scheme which runs parallel to those designed to enforce Title VII and the Equal Pay Act. The Office for Civil Rights, which has special expertise with respect to schools, is available to respond to discrimination complaints, and to conduct its own investigations of compliance. Moreover, given the special interrelationship between employment and student discrimination in schools, it is particularly beneficial for the Office for Civil Rights to have the authority to review both together, or aspects of each as it determines is necessary or appropriate.

The special importance of assuring that federal funds are not used in a discriminatory manner is the basis as

well for Executive Order 11246,[23] which prohibits employment discrimination by any employers receiving federal contracts. The program for enforcement of this Order, delegated to the U.S. Department of Labor and funded by Congress, uses fund termination as its basic remedy when conciliation fails. 41 C.F.R. § 60-1 *et seq.* The Executive Order enforcement purpose is similar to the Department of Education's Title IX enforcement goal—to assure that federal funds are used in a nondiscriminatory manner. Just as the Executive Order prohibitions against employment discrimination are neither of only academic interest, nor inferior in importance to those of Title VII and the Equal Pay Act, so too the employment discrimination prohibitions of Title IX are of great significance.

Moreover, as Congress was aware in 1972, the Executive Order applies only to federal contracts, unlike Title IX which also applies to grants and loans. 34 C.F.R. § 106.2(g). Therefore, as a practical matter, the Executive Order has virtually no application to elementary and secondary schools which receive vast grants, but not contracts, from the federal government. Title IX's coverage of employment extends to elementary and secondary schools the fund-termination remedy and a federal enforcement scheme which applies to virtually all other major employers through the Executive Order program.[24]

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[23] 30 Fed. Reg. 12319 (1965) *as amended by* Exec. Order No. 11375, 32 Fed. Reg. 14303 (1967), *reprinted in* 42 U.S.C. § 2000e (1970).

[24] Moreover, the court enforcement powers of the Equal Employment Opportunity Commission ("EEOC") do not extend to public employees. 42 U.S.C. § 2000e-5(f)(1970)(Supp. III 1973). Thus, for the public school teacher or principal and the faculty and administration in public, postsecondary institutions, if conciliation of a complaint fails, unless the case is referred by EEOC to the Justice Department and pursued by that agency, these employees will have to pursue their rights as private plaintiffs, often a tremendously costly undertaking. The resources of the

As the Supreme Court stated in *Cannon* v. *University of Chicago*, 99 S.Ct. 1946, 1965 (1979), when addressing the issue of whether Title IX includes a private right of action:

> The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section.

III. FEDERAL FINANCIAL ASSISTANCE FLOWS BOTH TO STUDENTS AND EMPLOYEES

A further argument advanced as to why Title IX does not prohibit employment discrimination is that Congress could not have intended the severe sanction of fund termination to apply where employment discrimination was shown. *Romeo Community Schools* v. *HEW*, *supra* at 584. The cases also hold that employees are not beneficiaries of federal financial assistance to educational institutions. *Romeo Community Schools* v. *HEW*, *supra*, at 584; *Isleboro Sch. Comm.* v. *Califano*, *supra*, at 426. This reasoning not only ignores the seriousness with which the 1972 Congress viewed employment discrimination in schools, *see North Haven Board of Education* v. *Hufstedler*, *supra*, at 785, but also ignores the nature of much of the federal financial assistance flowing to schools, which directly benefits employees as well as students.

Justice Department's Civil Rights Division unit for fair employment litigation are far less extensive than those available to EEOC for this purpose, which places most teachers at a clear disadvantage in comparison to employees in the private sector. Private sector employees have, for the most part, both the Title VII options with the potential of EEOC undertaking litigation and the remedies offered by the Department of Labor's Executive Order 11246 enforcement program. *See* discussion, *supra* at 15-16. Title IX employment coverage helps to fill this gap.

As the most simple example, there is express statutory language which identifies teachers as well as students as intended beneficiaries of federal funds. *See, e.g.*, Education Amendments of 1972, Pub. L. No. 92-318, Title VII, 20 U.S.C. § 1601 *et seq.* (1970) (Supp. V 1975). Indeed, the stated purpose of this legislation, enacted at the same time Title IX became law, is:

> "(1) to meet the special needs incident to the elimination of minority group segregation and discrimination among students *and faculty in elementary and secondary schools;* . . . ." (emphasis supplied)

20 U.S.C. § 1601(b)(2) (1970) (Supp. V 1975). Activities authorized by this statute include training and retraining of staff and the recruiting, hiring and training of teacher aides. 20 U.S.C. §§ 1606(a)(2), (3) and (4) (1970) (Supp. V 1975).[25] Therefore, at the very time Congress enacted Title IX, it also enacted educational funding statutes with the express purpose of aiding faculty as well as students.

However, the federal funding benefiting employees in schools is far more extensive than special purpose funding statutes such as the ones discussed above. The Fifth Circuit in *Dougherty County School System* v. *Harris*, *supra* at 738, recognizes that in fact teacher salaries may be paid by a federally funded program, regardless of whether teachers are expressly termed beneficiaries, and

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[25] In 1978, these provisions were repealed effective September 30, 1979. Pub. L. No. 95-561, Title VI, § 617(b)(2), 92 Stat. 2268, but the relevant section of the purpose clause relied upon by *amici*, 20 U.S.C. § 1601(b)(2) (1970) (Supp. V 1975), was reenacted in Pub. L. No. 95-561, Title VI, § 602(b)(2)(1978), and is now codified at 20 U.S.C. § 3192(b)(1)(1976)(Supp. III 1979). Authorized activities continue to include programs specifically for the teaching staff. *See* 20 U.S.C. § 3197 (1976) (Supp. III 1979), which replaced § 707 of the 1972 enactment of the Emergency School Aid Act, Pub. L. No. 92-318, Title VII, § 707, 20 U.S.C. § 1606 (1970)(Supp. V 1975).

that in such cases employment discrimination on the basis of sex is prohibited under Title IX.

Moreover, schools also receive vast amounts of virtually unrestricted federal funds which benefit both employees and students, and flow through the educational institution. *North Haven Board of Education* v. *Hufstedler, supra* at 785-786. For example, Congress provides funds on a formula basis for elementary and secondary school districts which serve children residing on federal property, children whose parents work on federal property or are on active duty in the uniformed services, and children whose parents are refugees. The statute also offers assistance to local educational agencies in those communities where the tax base has been reduced by substantial acquisition of real property. 20 U.S.C. §§ 237-238 (1970). This program, commonly known as Impact Aid, and solidly in place before Title IX was passed, assisted 4,800 school districts in FY 1972.[26] No restrictions are placed on these funds once they are received by the local educational agency.

The Impact Aid program also provides construction assistance support for minimum school facilities where substantial increases in school membership have been caused by federal activities or where reconstruction of facilities is necessitated by a national disaster. 20 U.S.C. § 241-1 (1970). In 1972, over $25,000,000 was obligated under this program.[27]

At the postsecondary level, the federal government has provided increasing resources for undergraduate and

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[26] During FY 1972, grants of $592,580,000 were obligated. *Catalogue of Federal Education Assistance Programs*, Office of Education, U.S. Department of HEW, U.S. Government Printing Office, 1974 at 149.

[27] *Catalogue of Federal Education Assistance Programs, supra*, note 26, at 148.

graduate student support. Several of these programs provide grants and/or loans to students needing funds to pay tuition and fees or for basic support during the absence from the work force occasioned by their studies. In 1970-1972, the period during which Title IX was under consideration by the Congress, there were several active higher education grant mechanisms. The oldest was the Veterans' Educational Assistance program, 38 U.S.C. § 1651 *et seq.* (1970) administered by the Veterans' Administration, which provides funds to individuals who have completed military service or had their education interrupted by active duty.[28] Over $1.5 billion was obligated in FY 1971 under this program. *Catalogue of Federal Education Assistance Programs, supra,* note 26, at 313. By offering tuition payments and stipends to ex-members of the armed forces, the federal government substantially increases the pool of applicants to colleges and universities and enables those institutions at which veterans enroll to concentrate their own financial aid resources on other students. *Bob Jones University* v. *Johnson,* 396 F.Supp. 597 (D.S.C. 1974), *aff'd per curiam,* 529 F.2d 514 (4th Cir. 1975).

In 1965, the Higher Education Act established the Educational Opportunity Grants program ("EOGs") to provide funds for undergraduate students with exceptional financial need. Grants of up to $1,000 or one-half of the amounts provided to the students from other institutional financial aid per year, whichever was less, were possible for up to four years of study.[29] The Education Amend-

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[28] The Veterans' Administration has also issued proposed Title IX regulations, 44 Fed. Reg. 24320 (April 25, 1979) as required by statute. Executive Order 12250 assigns responsibility for coordinating enforcement of Title IX *inter alia,* to the Attorney General. 45 Fed. Reg. 72995 (Nov. 4, 1980).

[29] In fiscal year 1971, an estimated 290,000 students at 2,100 institutions received EOG assistance. H.R. REP. NO. 554, 92d Cong., 2d Sess., *reprinted in* [1972] U.S. CODE CONG. & ADM. NEWS, 92d Cong., 2d Sess. 2477.

ments of 1972 replaced the EOG program with a two-part grant system, Basic Educational Opportunity Grants ("BEOGs") and Supplemental Educational Opportunity Grants ("SEOGs"), Pub. L. No. 92-318, Title IV, Part A, 86 Stat. 248, [1972] U.S. CODE CONG. & AD. NEWS, 92d Cong., 2d Sess. 293-302. Both laws provide grants to students with limited financial resources.[30] These funds, as was true with the EOG grants, can be used by students to pay their tuition or student fees.[31]

To the extent that these federal funds from the Veterans' Administration and from the Department of Education are used to pay tuition and fees charged the student, universities use those funds to fill their general funding needs. The funds flow into the unrestricted fund categories of the university accounts and can then be used by the institution for any purpose its chooses—faculty salaries, new facilities, library books, heating fuel or any other acceptable expenditure for a college or university.

In sum, large amounts of federal funds are provided to elementary and secondary schools and higher education

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[30] These funds, available for eligible students in sums based upon Congressional appropriations, have been held to be federal financial assistance to a college sufficient to obligate it under the Department of Education Title IX regulation which requires recipients to file an assurance of compliance with Title IX prior to receipt of such funds. Grove City College v. Harris, No. 78-1293 (W.D. Pa. June 26, 1980), appeal pending, Nos. 80-2383, 2384.

[31] Today the BEOG program is enormous. In fiscal year 1979 over $2.3 billion was obligated in grants under the BEOG program. During the 1978-79 award period an estimated 1,800,000 students enrolled in about 6,700 postsecondary schools received Basic Grants (BEOGs). *1979 Catalogue of Federal Domestic Assistance*, Executive Office of the President, Office of Management and Budget, U.S. Government Printing Office, Washington, D.C. 320. The SEOG program operates on a smaller scale, with approximately $340,100,000 in grants obligated in fiscal year 1979, providing assistance to some 573,000 students. *Id.* at 258.

institutions which in essence constitute general support for their operations. The funds may be used to pay teacher and administrative salaries, build teacher lounges, administration offices and facilities and the like. A finding that the 1972 Congress did not intend to prohibit these federal funds from being used to support employment discrimination flies in the face of Congress' own stated purposes and goals not only in enacting Title IX, but also in its other actions and statements throughout that legislative session.

It defies simple logic to conclude, as did the court below, that the Congress would have amended Title VII and the Equal Pay Act to cover employment discrimination in schools, declared its concern about the especially grave problems of sex discrimination in employment in schools, passed federal funding statutes naming teachers as well as students as the beneficiaries of the funds, yet excluded employees from protection against discrimination in the use of federal funds. In short, simple logic, as well as the plain meaning of the statute which contains no employment exemption, support the inclusion of employment discrimination within Title IX.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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